SIMPLY

SCANDINAVIAN INSTITUTE OF MARITIME LAW YEARBOOK

2023

583

SIMPLY 2023

MarIus No. 583

Sjørettsfondet
Nordisk institutt for sjørett
Universitetet i Oslo

ISSN: 0332-7868

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Digital Publishing: Aksell AS

Content overview

Editor's Preface

This year's issue of SIMPLY comprises four articles:

The first is by Aleksander F. Taule, who discusses the relationship between international liability limitation conventions and their relationship to national law – with the topic forming part of a larger discussion with contributions from Erling Selvig in SIMPLY 2021 and myself in SIMPLY 2016.

The second is by Thor Falkanger, who gives an account of rules comprising transition to electronic registration in the Norwegian Ship Registrers.

Then follows two articles on marine insurance, both based on lectures given at a conference on marine insurance organized by the law firm Wikborg Rein and the Scandinavian Institute of Maritime Law on 13 March 2024. Both articles deal with the influence of events of war on key aspects of marine insurance – the first by Sir Richard Aikens taking an English law perspective, the second by Trine-Lise Wilhelmsen taking a Norwegian and Nordic perspective.

Trond Solvang

Limitation of liability for wreck removal and clean-up costs

A discussion on the applicable limitation regimes under the Norwegian Maritime Code and the Convention on Limitation of Liability for Maritime Claims 1976 with its 1996 Protocol

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Content

1 Introduction[1]

1.1 The article´s topic and purpose

Transport at sea is perilous. Accordingly, marine casualties and accidents are unfortunately facts of life for individuals and entities operating vessels. The perilous nature of transport at sea has not however held back shipowners from carrying on their business. Transport at sea enables global trade, with currently around 90% of all goods sold being transported, at least partly, by sea. When taking into account both the value of the vessels and value of the goods transported, we immediately understand that a serious marine casualty could be ruinous for a shipowner. Consequently, various forms of legal frameworks have existed for a long time to prevent the perils of the sea from discouraging shipowners from carrying out their trade. The legal instruments achieve this by entitling the shipowner[2] to limit his liability for claims that arise as a consequence of a marine casualty.

One important example of a legal instrument that affords the shipowner a right to limit his liability for so-called maritime claims is the Convention on Limitation of Liability for Maritime Claims of 1976 (the "LLMC")[3] with its protocol of 1996 (the "1996 Protocol").[4] In essence, the purpose of the LLMC is to set out a maximum amount for the shipowner´s total liability per accident. The maximum amount is determined mathematically, based on the relevant vessel´s gross tonnage. Although the definitions of claims for which liability can be limited are admittedly wide, the LLMC only entitles a shipowner to limit his liability for claims that fall under one of the letters in the LLMC art. 2 no. 1 (a)-(f). However, the LLMC art. 2 no. 2 makes it clear that it does not matter whether the claim is a "direct" claim or a claim made by way of recourse.

Whether a claim falls under one of the letters is a matter of construction. The "definitions" in these letters are broadly drafted. The wording of the LLMC does not in itself make it clear that they are mutually exclusive. Accordingly, the LLMC arguably opens the door to a claim falling under more than one of the letters in art. 2 no. 1 (a)-(f). An overlap between the different letters would not have been a problem, had it not been for the LLMC art. 18. According to this provision, the member states are entitled to make reservations against art. 2 no. 1 letter (d) and (e). If a member state has made reservations against the LLMC art. 2 no. 1 letter (d) and (e), the state is free to decide either to preclude the shipowner from limiting his liability at all, *i.e.* unlimited liability, or instead to implement national rules under which the limitation amount for such claims is higher than it would be under the convention.[5] Consequently, for claims that fall under either the LLMC art. 2 no. 1 letter (d) or (e), the economic consequences for the shipowner may be dramatic.

The LLMC art. 2 no. 1 letter (d) and (e) entitles a shipowner to limit liability for

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1 Many thanks to my friend Leon Theimer at Humboldt-Universität zu Berlin, and to my colleagues at the Institute Mads Schjølberg and Sara Tesfai, for reading a draft to this article.

2 In the following, I refer only to shipowners for simplicity, but it is important to emphasise that other individuals/entities may be entitled to limit their liability, cf. the LLMC art. 1 and the Norwegian Maritime Code section 171.

3 As the convention was signed in London, the LLMC is in practice sometimes referred to as the London Convention.

4 In the following, I will refer to the LLMC as amended by the 1996 Protocol and only refer to the latter separately if relevant.

5 As I will get back to in section 3 below, Norway has adopted the latter approach. There we will also have a look at the rationale for member states to the LLMC to make reservations in accordance with art. 18 no. 1.

> "[c]laims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship"

and,

> "[c]laims in respect of the removal, destruction or the rendering harmless of the cargo of the ship".

Wreck removal might be a consequence of a vessel grounding and thereafter sinking, either completely or partly, due to a hole in the hull of the vessel. Similarly, the grounding might cause cargo to fall overboard and either that, or the hole in the hull, may lead to a bunker oil spill.[6] In such a case, the authorities of the state in whose territorial waters the wreck lies will usually order the shipowner to remove the wreck and carry out other necessary clean-up measures. In some instances, the authorities carry out these operations themselves and claim the costs from the shipowner. Depending on whether the state in which the grounding occurred imposes unlimited liability for such costs, or has implemented rules with higher limitation amounts, if the state has made a reservation in accordance with the LLMC art. 18, the shipowner´s liability will in any event be higher than under the LLMC regime.

The same vessel may also, however, have become a wreck, lost cargo or leaked bunker oil,[7] due to a collision with another vessel.[8] If vessel A is ordered to be removed by the public authorities after the collision, the owner of vessel A incurs costs either personally, or else has to cover the authorities' costs for the removal and clean-up operation. In either case his liability for these costs would fall under the LLMC art. 2 no. 1 letter (d) and (e), in the same way as they would for a grounding incident. The apportionment of blame for the collision is determined by the applicable collision rules in the state where the collision occurs,[9] and has in principle nothing to do with the LLMC.[10] However, if vessel B is either wholly or partly to blame for the collision, the owner of vessel A is in a position to make a claim for damages against B, both for the loss of the vessel but also for the costs related to the wreck removal and clean-up operation. As the latter heads of loss relates to wreck removal and clean-up operation and therefore falls under the LLMC art. 2 no 1 letter (d) and (e) for the owner of vessel A, the owner of vessel A will typically argue that it is only natural that the owner of vessel B´s liability towards A should be determined by the same letters as they are for A. B´s liability might then be unlimited, or at least limited to a higher amount. Such an understanding of the LLMC art. 2 no. 1 letter (d) and (e) is attractive for shipowners who find themselves in the same position as the owner of vessel A. Conversely, the owner of vessel B might argue that the wreck removal and clean-up operation is a

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6 Oil spill from crude oil in transport is regulated by a separate limitation regime, see section 2 below.

7 Cf. fn. 6 above.

8 In the following, I will refer to the vessel becoming a wreck, losing cargo and/or spilling bunker oil as vessel A, and to the other vessel as vessel B.

9 For collisions to which Norwegian law applies, the applicable rules are found in chapter 8 of the Norwegian Maritime Code 1994, which implements the Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910.

10 Since the LLMC sets out the rules for the maximum economic liability, there must therefore exist a liability for it to apply. If there is no liability, then there is nothing to limit. Accordingly, if vessel B cannot be blamed, vessel A will not have a claim and the issues discussed in the following would accordingly not arise. Other than precluding the shipowner from limiting his liability in instances where it is proved that "the loss resulted from [the shipowner's] personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result", cf. the LLMC art. 4, the LLMC is not concerned with liability issues as such.

consequence of the collision, and accordingly the claim being made by A against B is only a claim "in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connexion with the operation of the ship or with salvage operations, and consequential loss resulting therefrom", cf. the LLMC art. 2 no. 1 letter (a).

For B, the costs related to the wreck removal and clean-up operation are only a part of the total claim for damages from A. All heads of A´s loss can be traced back to the same causative event that makes B liable towards A: the collision.

The question of whether the owner of vessel B´s liability limit towards the owner of vessel A is solely determined by the LLMC art. 2 no. 1 letter (a), and then limited to the one amount that follows from art. 6, or should instead be divided into two, so that the liability for the loss of, or damage to, vessel A falls under the LLMC art. 2 no 1 letter (a), with the loss for wreck removal and clean-up operation falling under the LLMC art. 2 no. 1 letter (d) and (e), is a contentious issue.[11] In this article, it will be argued that the owner of vessel B´s liability limit in instances like the one above is solely decided by the LLMC art. 2 no. 1 letter (a). The consequence of this is that the owner of vessel B's total liability is limited to *one* limitation amount.

1.2 Further structure of the article

Although limitation of liability is a well-known concept for most lawyers, particularly in the form of limited liability for companies,[12] it might appear somewhat peculiar as to why individuals and entities operating in the shipping industry should be entitled to have their liability limited when compared against individuals in other industries. Because a potential reflex to this might be that the limitation regimes seem "unfair", I will briefly deal with the historical background and both the historical and current underlying rationale for these rules in section 2. The main point being made in that section is to remind the reader that the limitation rules are not "matter(s) of justice" but instead "rule(s) of public policy".[13] Precisely because of this, the courts should avoid emphasising considerations of "fairness"[14] in the sense of degrees of blameworthiness/innocence when interpreting systems of rules based on economic considerations. Here it is important to remember that the rules on limitation of liability apply only after the substantive law has imposed liability.

Section 3 deals with the relationship between the LLMC and the Norwegian Maritime Code (the "NMC"). In section 3.1, I briefly describe how the LLMC is implemented under Norwegian law. Thereafter, in section 3.2, I set out the background for Norway´s reservation against the LLMC art. 2 no. 1 letters (d) and (e), and how Norway has implemented a separate limitation regime for claims that fall under those letters in the NMC chapter 9. As we shall see in section 4.1, the Norwegian legislator´s rationale for making a reservation in accordance with the LLMC art. 18 coincides with the rationale for allowing member states to make

11 See *i. a.* Patrick Griggs, Richard Williams and Jeremy Farr, *Limitation of Liability for Maritime Claims*, 4 thed., London 2005, pp. 23–24, Norman A. Martínez Gutiérrez, *Limitation of Liabality in International Maritime Conventions*, London and New York 2011, pp. 99–102, Richard Williams, "Problematic Areas in the Current Global Limitation Regime" in: D. Rhidian Thomas (ed.), *Liability Regimes in Contemporary Maritime Law*, London 2007, pp.279–299, pp. 294ff. And for the position under Norwegian law compare Trond Solvang, «Some reflections concerning the scope of the Maritime Code section 172a», MarIus 2016 nr. 482, pp. 31–41 and Erling Selvig, "The Limitation Regimes for Maritime Claims" SIMPLY 2021, nr. 565, 2022, pp. 69–135.

12 Either private or public.

13 The «Bramley Moore» (1963) 2 Lloyd´s Rep. 429, per Lord Denning at p. 437.

14 The system can in a sense be said to be by definition unfair. The claimant who has his or her loss limited will understandably think that this is "unfair".

reservations against the LLMC art. 2 no. 1 letters (d) and (e) in the first place. In section 3.3, I set out how the NMC's provisions should be interpreted and in section 3.4, we will have a brief look at the *Helge Ingstad* decision.

After having discussed Norwegian law, I move on to the position under the LLMC. Since Norwegian law is based on the LLMC, the same approach to the interpretation of the LLMC applies as for the NMC. As we shall see, although the position argued for in this article finds support in a Norwegian lower instance decision and in some other decisions relating to similar issues, it is contrary to that of several decisions by final appeal courts in member states to the LLMC. The aim of this article, to put it bluntly, is to equip judges or arbitrators with a systematic approach that will enable them to move undeterred by the final appeal courts' decisions in future cases when interpreting the LLMC and the NMC.

In section 5, I end the article with some concluding reflections that reach wider than just to the issue discussed in this article.

2 The historical background of the limitation regime and the underlying rationale

Although there is some debate as to how far back we can trace rules on limitation of liability for shipowners,[15] we can safely trace the concept back to the Middle Ages.[16] As pointed out in section 1.1 above, maritime adventures have always been, and still are, particularly perilous. When combining the perilous nature of maritime adventures with the potential high value of the goods being transported, it is easy to see that a marine casualty could be economically ruinous for a shipowner, thus making the relative risk/reward ratio discouraging for the individual shipowner.[17] However, because transport by sea was the backbone of global trade, and global trade was regarded as important for the prospering of individuals and nations, various forms of limitation regimes developed to incentivise shipowners to continue carrying out their business.[18] What we see from this is that societies´ interests in trade as a whole were valued through these various limitation regimes at the expense of the individual "cargo owners" or other interested parties. Somewhat crudely, we can say that the underlying rationale for all of the various systems was a form of economic efficiency-thinking.

As shipping is by nature border-crossing, it is in general unfortunate that the applicable rules vary between different jurisdictions. One issue is that the varying rules make dispute resolution more complicated, another and more unfortunate issue with varying rules, is that it incentivise shipowners to go forum shopping in the jurisdiction with the most favourable law. The first effort to unify the limitation regimes led to the 1924 Brussels Convention,[19] but this received little international support, *i.a.*, because it was based on a compromise between various limitation regimes. Improvement was made with the next international effort in the 1957 Brussels Convention.[20] This convention´s approach to limitation of liability formed the basis for the LLMC. The 1957 Brussels Convention, similarly to the 1924 Brussels Convention, set out a list of claims for which liability could be limited by the shipowner, but more importantly, it was based on a system whereby the shipowner´s liability was calculated on the basis of the relevant ship ´s gross tonnage, with the calculation being tied to the Franc Poincaré. With the 1957 Brussels Convention the limitation amount increased, and the view on the justification for limitation for shipowners as a concept slightly changed. Whereas the previous systems "protected" the shipowners additionally against minor accidents and marine casualties, the new higher limits only gave protection for the more catastrophic events. The view was that safety at sea had improved and the shipowner could obtain security by insuring his liability. However, as marine casualties´ damage potential is significant, liability for such more catastrophic events should be limited, since this was generally seen to be uninsurable.[21]

15 Norman A. Martínez Gutiérrez, *Limitation of Liability in International Maritime Conventions*, London and New York 2011, p. 5.

16 Gutiérrez 2011 p. 5 and Erling Selvig, "Rederansvaret. § 4 – Del I. Ansvarsbegrensning" *MarIus* 1977, nr. 25, pp. 1–43, p. 4.

17 Before the introduction of the well-functioning limitation regimes we know today, it was not uncommon for the shipowner to "go down with the ship" (unfortunately in many cases this happened both literally and metaphorically).

18 For a more detailed description of the various older limitation systems see Gutiérrez 2011 pp. 15ff with further references.

19 International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Sea-going Vessels 1924.

20 The International Convention relating to the Limitation of the Liability of Owners of Seagoing Ships 1957.

21 Sjur Brækhus, "Det begrensede rederansvar", *Norsk Forsikringsjuridisk Forenings Publikasjoner* 1947, nr. 22, pp. 1–26, p. 17.

Despite the 1957 Brussels Convention being more successful than its predecessor, increasing inflation ate away at the real value of the limitation amount available for the claimants, and following the Torrey Canyon tanker incident on 18 March 1967, which led to a massive oil spill, the limitation limits were generally regarded as too low.[22] Because of oil tankers´ significant damage potential, a separate limitation system for crude oil spill was agreed to in the 1969 Oil Pollution Liability Convention (the "CLC").[23] However, the significantly higher limitation limits under the CLC only alleviated the situation for those scenarios where shipowners were from member states to that convention and the damage was caused by crude oil spill, with the consequence that shipowners from member states to the 1957 Brussels Convention still enjoyed the lower limits under the latter convention. The result was the LLMC in 1976. Compared to its predecessor, the LLMC entailed much higher limitation limits.

During the discussions that led to the LLMC, it was emphasised that the insurance market had developed, making much higher losses insurable.[24] The reasoning in relation to the limitation limits was that these limits should be as high as possible, albeit not so high that shipowners would be unable to bear the insurance premium costs.[25]

Similarly to the 1957 Brussels Convention, the inflation rates increasingly caused the limitation amounts under the LLMC 1976 to be of less real value.[26] The result was the 1996 Protocol to the LLMC, which increased the liability limits and contrary to the LLMC, has a procedure making it easier to increase the limitation limits where necessary.[27] The latest increase of the limits entered into force in June 2015.

Even more so than under the 1957 Brussels Convention, the limitation system was seen as being tightly linked to insurance. The reasoning was, and still is, that shipowners should be able to bear the costs of insurance premiums, and the flip side of this coin is that insurers then know their maximum potential liability per casualty. What might at first glance seem somewhat paradoxical is that by having the limitation regime we have today, claimants after a marine casualty are in general put in a better position than they would have been without the limitation regime. Without the regime, shipowners could easily have organised their business so that the only asset available for the claimants was the vessel, and even if the shipowners' liability were unlimited, this would then be cold comfort in instances where the vessel lay at the bottom at the ocean.[28] With the limitation regime, shipowners are able to obtain insurance and where the relevant shipowner is insolvent, claimants can make direct action claims against the insurer(s).[29]

Although it is evident that the view on the underlying justification for allowing shipowners to limit their liability has changed slightly, this brief historical enquiry

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22 Cf. *i. a.* NOU 1973: 46 p. 5.

23 The International Convention on Civil Liability for Oil Pollution Damage 1969, "renewed" by The International Convention on Civil Liability for Oil Pollution Damage 1992.

24 Cf. *i. a.* NOU 1980: 55 p. 10.

25 See *e. g.* the statements by Netherlands and Canada in Francesco Berlingieri, *The Travaux Préparatoires of the LLMC Convention, 1976 and of the Protocol of 1996*, p. 22. (The book is available here: https://comitemaritime.org/wp-content/uploads/2018/05/Travaux-Preparatoirse-of-the-LLMC-Convention-1976-and-of-the-Protocol-of-1996.pdf)

26 Berlingieri p. 480.

27 As emphasised by Selvig 2022 p. 93, the 1996 Protocol was in reality a completely *new* convention.

28 With the vessel often mortgaged close to full value, with other creditors making their prioritised claims against the shipowners.

29 Under Norwegian law, this follows from the Norwegian Insurance Act sections 7-6 and 7-8, but internationally, and related to our issue, one would have to look to CLC 1992 art. 7 no. 8, International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 art. 7 no. 10 and the Nairobi International Convention on the Removal of Wrecks 2007 art. 12 no. 10.

shows that the regimes have always been based on rationality in the form of economic efficiency. Today, the justification is that limits are necessary in order to make shipowners' liability insurable. The fact that insurability is the underlying justification for the limitation regime under the LLMC, is important to bear in mind when interpreting the rules, in order to avoid interpretations that negatively affect the insurability. The rules are based on a more or less coherent system on which the insurers once again base their insurance. In addition to being regarded as economically efficient, this also provides security for claimants. Courts and arbitrators should therefore be careful with construing the rules to be "fair" in an individual case, as this might have unintended consequences for other rules under the system. This could make the result in another case "unfair". This is why judges and arbitrators should refrain from having regard to "individual fairness" when interpreting the limitation rules.

3 The Norwegian Maritime Code and the LLMC

3.1 The relationship between the Code and the Convention

Norway was party to the 1957 Brussels Convention and had enacted the rules from that convention into its national legislation. The same approach was followed when the 1957 Brussel Convention was denounced, and the substituting LLMC 1976 was implemented in 1983. At that time the rules were found in chapters 10 and 15 of the Norwegian Maritime Code of 1893, with the "substantive" rules on limitation of liability in chapter 10 and the "procedural" rules on global limitation procedures in chapter 15.[30] Since the NMC entered into force, the rules can now be found in chapters 9 and 12 of the NMC.

Other than being enacted into Norwegian law by transformation, and thus being written in Norwegian, the rules under the NMC are in principle the same as those under the LLMC.[31] However, precisely because the LLMC is transformed into Norwegian law, and Norway has more detailed rules on global limitation proceedings,[32] situations might arise where the Norwegian text differs from the text in the LLMC.[33] In principle therefore, Norwegian law could be in breach of the LLMC. Norwegian courts will however strive towards interpreting the Norwegian rules in conformity with international treaties such as the LLMC. Norwegian law is in general presumed to be in accordance with Norway's international obligations.

Obviously, this issue only applies where Norway is bound by the LLMC. For issues falling outside the scope of the LLMC, Norwegian courts and arbitrators are free to construe Norwegian law without having regard to the convention. With respect to the relationship between the LLMC art. 2 no. 1 letter (a) on the one hand, and letters (d) and (e) on the other, this was unproblematic for Norway until 1 November 2006, when the separate national limitation regime in the NMC section 172a entered into force. This section, with its "sister" in section 175a (and its other siblings in sections 178a and 179), was a result of Norway's decision to make a reservation against the LLMC art. 2 no. 1 letters (d) and (e) in June 2002. Up to this point, shipowners' liability was limited to *one* limitation amount as set out by section 175,[34] regardless of whether the claim fell under letter (a), on the one hand, or (d)-(e) on the other. The NMC section 172 sets out the claims that fall under the LLMC regime, while section 172a sets out the claims that fall under the national regime.

Because of the decision to implement separate national limitation regimes for wreck removal and clean-up claims, the Norwegian law on limitation of liability for maritime claims is often said to be based on a "two track model".[35] Other than setting out higher limitation limits for these claims in section 175a, and allowing the shipowner to claim his own costs for wreck removal alongside other mitigation and clean-up measures against the limitation fund, cf. section 179, the rest of the rules in chapter 9 of the NMC apply to claims falling under the national "track". Accordingly, the rest of the applicable rules are based on the LLMC. However, if a claim falls under the national regime, the courts and arbitrators are in principle

30 These rules were, and still are, common for global limitation proceedings, according to both the LLMC and the CLC.

31 Compared to the LLMC, the NMC has more detailed rules on global limitation proceedings.

32 Similarly to the other Nordic countries.

33 Cf. *i. a.* Mads Schjølberg, "Interpreting uniform laws – the Norwegian perspective", *MarIus* 2016, nr. 475, pp. 145–211, pp. 169ff on issues that may arise when international uniform laws are enacted into national legislation by transformation (in that case in relation to the Hague Rules).

34 Equivalent to the LLMC art. 6 as amended by the 1996 Protocol. Similarly, no reservation was made against the "same" provision in the 1957 Brussels Convention, cf. Innstilling I fra Sjølovkomitéen 1960, p. 38.

35 See *i. a.* Selvig 2022 pp. 99ff.

free to construe these rules without having regard to the LLMC, provided the claim(s) falls under the national regime.[36]

It is precisely because Norway has a separate national regime in the NMC section 172a for so-called wreck-removal and clean up claims falling under the LLMC art. 2 no. 1 letters (d) and (e), with higher limitation limits in the NMC section 175a, that it becomes of significant importance whether a claim falls under this national regime, or under the regime set out by the LLMC. If a claim is considered to fall under *e.g.* the LLMC art. 2 no. 1 letter (a), this claim cannot at the same time also be considered to fall under letter (d) (the national system), since the higher limitation limits would infringe the shipowner's right to have his liability limited to the amount set out in the LLMC art. 6. As emphasized by Selvig, once a member state has made a reservation in accordance with the LLMC art. 18, then the LLMC art. 2 no. 1 letters (a), (b), (c) and (f) on the one hand, and letters (d) and (e) on the other, are mutually exclusive.[37]

When Norwegian courts have to decide whether a claim falls under one or the other system, the decisive factor will be an interpretation of the NMC section 172 and 172a. Because of this, it would make sense for us to first have a look at the wording of these provisions, and compare them with the wording of the LLMC art. 2 no. 1. Before we do this, however, it is useful to look briefly at the public policy considerations emphasized in the preparatory works, which explain why Norway made the reservation in the first place. Therefore, we shall look at these considerations in section 3.2 below, before moving over to the wording of the NMC in section 3.3. In section 3.4, we shall briefly have a look at the *Helge Ingstad* decision.

3.2 The public policy considerations motivating Norway´s reservation against the LLMC art. 2 no. 1 letters (d) and (e)

According to Norwegian law, a shipowner is under a strict liability to avoid, mitigate and clean up any form of pollution and debris (including the ship itself, cargo on board, or other physical objects) caused by a marine casualty, cf. the Norwegian Pollution Act (the "NPA") sections 7 and 28. The shipowner can also be ordered to carry out clean-up operations, cf. the NPA sections 7 fourth paragraph and 37 first and second paragraph. However, because of the damage potential that serious marine casualties entail, Norwegian authorities usually carry out their own mitigation and clean up-operations, more or less immediately after being notified of a casualty, cf. the NPA section 74. Such operations are expensive, and the authorities can demand that the costs for such operations be reimbursed by the shipowner, cf. the NPA section 76.[38]

Until Norway made its reservation against the LLMC art. 2 no. 1 letters (d) and (e), the view had been that the limitation amounts set out by the LLMC art. 6 and implemented in the NMC section 175 provided satisfactory cover for both wreck removal and clean up-costs incurred by public authorities after marine casualties. This view changed after subsequent casualties had made it clear that the then applicable limit under the NMC section 175 was too low for the public authorities to have their costs reimbursed for more than solely catastrophic events.[39] Because of this experience, Norway made a reservation against the LLMC art. 2 no. 1

36 For the sake of consistency and foreseeability, however, it is submitted that Norwegian courts and arbitrators should construe these rules in the same way, regardless of whether a claim falls outside or inside the scope of the convention. Cf. also comments to the NMC section 172a in Ot.prp. nr. 79 (2004–2005) p. 41.

37 Selvig 2022 p. 111.

38 For more on the statutory regime under the NPA, see *i. a.* NOU 2002: 15 pp. 19–23 and Selvig 2022 pp. 115ff.

39 NOU 2002: 15 pp. 28–29 and Ot.prp. nr. 79 (2004–2005) pp. 23–26.

letters (d) and (e) on 28th June 2002,[40] with the afore-mentioned separate national limitation regime being a result.

From the preparatory works of both the Maritime Law Commission (NOU 2002: 15) and the Ministry of Justice and Police (Ot.prp. nr. 79 (2004–2005)), it is evident that it was a public policy argument that Norwegian authorities should not be left footing the bill for wreck removal and clean up-costs after marine casualties, which motivated the implementation of the national limitation regime. That this was the case is already evident from reading the request of the Ministry of Justice and Police to the Maritime Law Commission. After introducing the then applicable limitation rules, it provides that: "Costs that exceed the shipowners' liability (limit) will usually have to be covered by public authorities when removal and destruction of ship and cargo, or other mitigating measures, are carried out."[41] Further on in the request it states that:

> "It seems reasonable that the shipping industry should carry a larger part of the costs incurred than is the case with the applicable liability limits, where the state – as was the case in the 'Green Ålesund' casualty – has to foot the bill for large parts of the costs related to clean up etc."[42]

As we can see, in the request to the Maritime Law Commission, the Ministry´s concern was related to the fact that the state had to carry costs that should have been borne by shipowners. Furthermore, the Ministry particularly wanted the Maritime Law Commission to review whether liability for claims that fell under the reservation should be limited, although with sufficiently high limitation amounts, or whether liability should be unlimited.[43]

In the Maritime Law Commission's recommendation for a separate national limitation system with higher limits for wreck removal and clean up-costs, instead of unlimited liability, it is interesting, but not surprising, to see that the rationale for this is the same as the rationale underpinning limitation of liability for maritime claims in general. Without this right, the insurance premium costs would be too high for smaller vessels, leaving public authorities and other claimants without the security that liability insurance entails.[44] Again, we see the paradox that claimants are generally better off when running the risk of having their claims limited. However, by setting the limits high, this risk would only be theoretical. The Maritime Law Commission assumed that the higher limits suggested would have the consequence that "public authorities in more instances than is the case today will get their costs caused by clean-up measures covered" by the shipowner.[45]

The Ministry agreed with the Maritime Law Commission that limitation of liability for wreck removal and clean-up costs was necessary to enable shipowners to obtain insurance, thus ensuring that claimants get their losses covered, but it recommended even higher limits than the limits suggested by the Maritime Law Commission.[46] These higher limits were based on experience with cases where public authorities did not get full cover for their costs related to wreck removal and clean-up measures.[47] The suggested limits would provide "better cover for costs that the authorities or others have had in relation" to wreck removal or clean-up measures, and the aim was that for such claims "the higher limits will,

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40 Ot.prp. nr. 79 (2004–2005) p. 15.

41 NOU 2002: 15 p. 7 (my translation).

42 NOU 2002: 15 pp. 7–8 (my translation).

43 NOU 2002: 15 p. 8.

44 NOU 2002: 15 pp. 37–39.

45 NOU 2002: 15 p. 44 (my translation).

46 Ot.prp. nr. 79 (2004–2005) p. 23.

47 Ot.prp. nr. 79 (2004–2005) pp. 24.

in all imaginable cases, provide full cover",[48] *i.e.* shipowners' liability would in practice be unlimited.[49]

This brief review of the preparatory works leading up to the national limitation regime is important for two reasons. Firstly, it shows that the motivation for creating a separate system with higher limitation limits for wreck removal and clean-up costs was to ensure that the public authorities (and other potential claimants) would get full cover for their costs relating to such measures by the shipowner responsible for the "pollution". The higher limits were regarded to ensure this. Secondly, but tightly linked with the first, the attention is directed towards the shipowner liable for the "pollution", rather than towards other third parties, such as another vessel B colliding with vessel A, that gives rise to the "pollution" after the collision. Accordingly, the purpose was to secure the authorities' position vis-à-vis the owner of the vessel becoming a wreck and/or causing pollution, and not to improve the latter's position vis-à-vis other third parties involved in the factual circumstances leading up to the pollution.

The view that the enactment of the national limitation regime did not aim to affect the relationship between two vessels involved in a collision *inter se*, but was solely aimed at regulating the relationship between the shipowner of the vessel constituting and/or causing pollution and the public authorities, is supported by the NPA. In theory, one could imagine the authorities making a claim (directly) against the owner of vessel B for reimbursement of the authorities' costs for wreck removal and clean-up operations related to vessel A, in an instance where B ran down A and accordingly caused the latter to become a wreck. If that were the case, there is no doubt that B's liability towards the authorities would be limited by the higher limits under the national regime. However, it is highly unlikely that the authorities could make such a claim against B under the NPA. A wreck removal order can only be made against the "owner of […] the vessel" that constitutes pollution, according to the NPA section 28, cf. the NPA section 37 second paragraph.[50] If the authorities themselves carried out the removal of the wrecked vessel A, it would not be consistent if a claim for the wreck removal costs could be made against B, when he cannot be ordered to remove the wreck. Furthermore, the Norwegian courts' restrictive interpretation of "the responsible" entity in the NPA sections 7, 74 and 76, makes it unlikely that a claim for other clean-up costs related to vessel A would be successful against B.[51]

To this latter point it should be added that B's liability towards the authorities would then, at the utmost, be jointly together with A,[52] and it would not necessarily be strategic to make a claim against B instead of A. As we know, the rules on limitation do not affect the underlying liability rules, *i.e.* it is not necessarily the case that B is liable at all for vessel A's pollution even though B collided with A. A might in fact be 100% to blame for the collision. However, there is no doubt under the NPA that the shipowner of vessel A is liable towards the authorities for the pollution caused by his vessel.

Other parts of the preparatory works do not change the perception that the purpose behind Norway's reservation against the LLMC art. 2 no. 1 letters (d) and (e) was to improve the position of third parties affected by pollution, and not the position of shipowners involved in a collision making claims against each other.

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48 Ot.prp. nr. 79 (2004–2005) p. 36 (my translation).

49 Although aiming for limits that should provide cover in all imaginable cases, the Ministry emphasises that the limits should not be so high that the insurance premium costs would be unnecessary high for shipowners, cf. Ot.prp. nr. 79 (2004–2005) pp. 24.

50 My translation.

51 See *i.a.* Rt. 2012 p. 944 (Elverum Treimpregnering AS). See also Thor Falkanger, «Sjøtransporten og den norske forurensningsloven», in: *Festskrift till Kurt Grönfors,* 1991, pp. 147–168, section 5 and 8 and Hans Chr. Bugge, *Forurensningsansvaret: Det økonomiske ansvaret for å forebygge, reparere og erstatte skade ved forurensning,* Oslo 1999, chapters 12–14.

52 NOU 1980: 55 p. 17.

The then applicable law is set out in section 2 of the Maritime Law Commission's report. The Commission refers to the NOU 1980: 55 p. 17 and states that in cases where damage to harbour facilities, basins, waterways and navigation aids have been caused by a marine casualty, "the cost of removal of ship and cargo etc., may however be conceived of as a part of the liability property damage" to those objects.[53] The consequence of this was that these costs fell under the NMC section 172 no. 1, equivalent to the LLMC art. 2 no. 1 letter (a). That construction of the provision would limit the applicability of the LLMC art. 2 no. 1 letters (d) and (e) to situations where the claimant has not suffered a property damage and where a joint wreck removal order has been issued.[54] Because such an understanding would correspondingly limit the effect of a reservation, the Maritime Law Commission was of the view that

> "[t]he delimitation between these provisions ought therefore to be assessed anew. The Commission is of the opinion that better reasons point to the line being drawn on a distinction between, on the one hand, the property damage and the economic consequences of this, and on the other hand, the costs related to wreck removal and other clean-up measures required by the marine casualty."[55]

Accordingly, the public authorities and other third party claimants should not have their costs for wreck removal and clean-up measures fall under the NMC section 172 no. 1 if they were unlucky enough to have also suffered property damage. The shipowner's liability for the costs relating to the latter would fall under the NMC section 172 no. 1, and for the costs related to the former, his liability would fall under the NMC section 172 nos. 4 and 5. This is in line with the aim of protecting third party interests that are unfortunately affected by marine casualties. It does not however say that a shipowner should enjoy the benefit of the higher limitation limits when making a claim for damages, which includes wreck removal and other clean-up costs, against another shipowner. It is interesting to note, as a general point, that neither the Maritime Law Commission nor the Ministry touch upon the relationship between shipowners *inter se* in their preparatory works.[56]

3.3 The proper construction of the NMC sections 172 and 172a

It was noted in section 3.2 above that the purpose behind Norway's reservation was to protect third party interests from having to foot the bill for a shipowner's pollution. In this section, we shall see that when construing the NMC sections 172 and 172a our focus should not be directed solely at what "type" of costs are being claimed as a loss, but also on the *causative event* that forms the basis for the claim. This again forces us to pay attention to who is making a claim against whom.

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53 NOU 2002: 15 p. 15.

54 As discussed in NOU 1980: 55 p. 17.

55 NOU 2002: 15 p. 15 (my translation).

56 Contrary to Solvang's view 2016 pp. 36–38, I read the preparatory works to support the "type of claim"-approach, since they do not touch upon "our" issue but so clearly state the purpose of Norway's reservation. This purpose is achieved by the type of claim approach, cf. section 3.3 below.

There is no "official" English translation of the NMC, but for our purposes the translation in *MarIus* 2014 no. 435 suffices.[57] The relevant part of section 172 reads as follows:

> "The right to limitation of liability pursuant to Section 175 applies, regardless of the basis of the liability, to claims in respect of:
>
> 1) loss of life or injury to persons (personal injury) or loss of or damage to property (property damage), if the injury or damage arose on board or in direct connection with the operation of the ship or with salvage;
> 2) damage resulting from delay in the carriage by sea of goods, passengers, or their luggage;
> 3) other damage if it was caused by infringement of a non-contractual right and arose in direct connection with the operation of the ship or with salvage;
> 4) measures taken to avert or minimize losses for which liability would be limited, including losses caused by such measures. […]"

The relevant part of section 172a reads as follows:

> "When the ship's tonnage exceeds 300 tons, the right to limitation pursuant to Section 175a, regardless of the basis of the claim, applies to claims on the occasion of:
>
> 1) raising, removal, destruction or rendering harmless a ship which is sunk, stranded, abandoned or wrecked, as well as everything that is or has been on board the ship;
> 2) removal, destruction or rendering harmless the ship's cargo;
> 3) measures taken to avert or minimize losses for which liability would be limited under this Section, including losses caused by such measures. […]"

First of all we should note that the distinction in the two sections between "claims in respect of" and "claims on the occasion of", in section 172 and 172a respectively, is not found in the official Norwegian version of the act (where the wording is the same, "krav i anledning av").[58] This point might seem trivial, but it illustrates something important: because there is no "official translation" of the act, and as Norwegian courts and arbitrators will therefore have to interpret the Norwegian version, there is generally not much for us to gain from carrying out a careful and detailed analysis of the meaning of the individual words in English. Nonetheless, the construction I argue for in the following still holds, regardless of whether we look at the English or Norwegian version of the act.

An interpretation of the provisions *in abstracto* is generally both hard to carry out and hard to follow as a reader. Because of this, we shall in the following use the two scenarios set out in section 1.1 above, as examples for our interpretation of the provisions. Before we do this, however, some introductory remarks to the provisions should be made. Firstly, a claim against the shipowner can fall under either section 172 or 172a, regardless of the "basis of the liability [/claim]", *i.e.* it does not matter for limitation purposes whether the liability is based on contract

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57 One should be aware that the NMC has been amended several times since 2014. A more recent translation, but there only of excerpts, is available through the Norwegian Maritime Authority's web page: https://www.sdir.no/en/shipping/legislation/laws/norwegian-maritime-code/ (last visited 26 February 2024).

58 The same point applies in relation to "regardless of the basis of liability" in section 172 and "regardless of the basis of the claim" in section 172a. In the Norwegian version the wording is the same ("uansett grunnlaget for ansvaret").

or tort (with the sub-division of fault-based liability and strict liability). Secondly, the wording "claims in respect of" is to be understood as meaning that it does not matter whether the claim being made is an "original claim", or instead a "derivative claim" in the form of a recourse claim.[59] As we shall see below, however, it is important not to be confused into thinking that a claim for damages for wreck removal costs after a collision is a derivative recourse claim,[60] entitling the claimant to a higher limitation amount.

We remember the two scenarios set out in section 1.1 above, one a marine casualty where only one vessel is involved and another with two vessels involved in a collision. Let me flesh them out now, with some further details to make them more illustrative.

Scenario 1: We start with the rather straightforward scenario where the bulker vessel A is not involved in a collision, but due to navigational errors ends up grounding. The grounding causes a bunker oil spill, cargo falls overboard due to the grounding, and, to make the example more illustrative, the grounding happens near shore with a navigational aid being hit and destroyed by the grounding. Public authorities[61] carry out a mitigation and clean-up operation of the leaked bunker oil and lost cargo. The costs are claimed reimbursed from A. The authorities order the shipowner to remove the vessel, and the shipowner does this. The destroyed navigational aid is replaced with new equipment and the authorities make a claim for damages against A for the costs.

Scenario 2: The bulker vessel A collides with the much larger oil tanker B. The bow of B tears a hole in the hull of A. To prevent the vessel sinking, the master of vessel A purposefully aims for land where navigational aid is placed. The hole in the hull leads to bunker oil spill, and as in scenario 1, cargo falls overboard and the same navigational equipment is destroyed. As in scenario 1, the authorities carry out a mitigation and clean-up operation of the leaked bunker oil and lost cargo. The costs are claimed reimbursed from A. The authorities orders the shipowner to remove the vessel, and the shipowner does this. The authorities replace the destroyed navigational aid with new equipment and make a claim for damages against A for these costs. A makes a claim for damages against B for the damage to the vessel, the clean-up costs, the costs for the wreck removal, and for the cost of the navigational equipment destroyed. The oil tanker B only suffers a small damage to the bow that is repaired on a repair yard. B makes a counterclaim for damages against A for the damage to the bow.

A fundamental point in this article is that the interpretation of the limitation rules should not be influenced by the shipowners' fault (or what might intuitively be regarded as "fair").[62] However, for scenario 2 to be any different from scenario 1, we have to assume that B is, at least in part, to blame for the collision with A. This is obvious. Unless B is to blame, there is no liability for B to limit.[63] If A is 100% at fault for the collision, scenario 2 is identical with scenario 1, with the addition that B has a claim against A for the repair costs. In the following therefore, we assume that scenario 2 is a both-to-blame collision,[64] but note that in my view the outcome would not be any different if B were solely to blame.

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59 NOU 1980: 55 pp. 15–16. The wording here includes what is set out separately in the LLMC art. 2 no. 2.

60 I use "derivative recourse claim" here to make a distinction with how "recourse" can be understood under *e.g.* English law, cf. Solvang 2016 p. 32 fn. 1 explains this in an instructive manner. A derivative recourse claim is accordingly "narrower" than a recourse claim.

61 The Norwegian Coastal Administration.

62 Cf. the point in sections 1.2 and 2 above on "fairness".

63 Cf. the NMC section 161.

64 When a marine casualty occurs, shipowners usually "declare" their liability limited, before it is determined whether they are liable at all. As a part of this "process", a global limitation fund is also usually established.

With the two different scenarios fleshed out, we can move over to categorising the different claims in both scenarios under the NMC sections 172 and 172a.

Under scenario 1, this exercise is not that difficult. Here it is the state making a claim against A. The state's claim for reimbursement of the cost for the mitigation and clean-up operation is a claim "on the occasion of [...] removal, destruction [of] everything that is or has been on board the ship" and "removal [of] the ship's cargo" and "measures taken to avert or minimize losses for which liability would be limited under this Section", cf. section 172a nos. 1, 2 and 3. The state's claim for damages for the destroyed navigational aid, on the other hand, is a "claim in respect of [...] loss of or damage to property" that "arose [...] in direct connection of the operation of ship", cf. the NMC section 172 no. 1.

If the shipowner establishes global limitation funds in accordance with the provisions in chapter 12 of the NMC, two funds will accordingly have to be established. One "property damage fund", where the maximum liability is determined by the NMC section 175, and one "wreck removal and clean-up fund", where the maximum liability is determined by the NMC section 175a. The shipowner is entitled to make a claim against the latter fund for his wreck removal costs, cf. the NMC section 179. Consequently, the shipowner's costs make the dividends for the other claimants in the fund correspondingly smaller.

Before we move on to doing the same exercise for the seemingly more complicated scenario 2, we should dwell on scenario 1 for a further moment. Even though the construction given above seems intuitive and straightforward by just reading the wording of the two sections, in principle, the construction could nonetheless be explained in different ways. There is however one approach that is better than the other(s).

One explanation is by focusing on the "type of loss (costs)" that are being claimed. As long as the reimbursement claim consists of costs that relate to clean-up costs and other such measures, they fall under section 172a, with the higher limit in 175a.[65] Similarly then, provided the replacement costs of the navigation aid are viewed as a "property damage loss", they fall under section 172, with the lower limit in section 175.[66] This view can be said to be supported by the use of the words "[...] losses for which liability would be limited under this Section" in section 172a no. 3 and the fact that the "basis of the claim [/liability]" is not relevant for the shipowner's right to limit liability. I refer to this as the "type of loss" approach.

Another explanation, and in my opinion the better one, is to focus on the *causative event*[67] that forms the basis of the claim for which the shipowner declares his liability limited.[68] This approach is more in line with how we otherwise "categorise" claims in other areas of the law. The reasoning runs as follows: as we have seen in section 3.2 above, the authorities can make a reimbursement claim against shipowner A, because by owning the vessel, A is "the responsible" party for the pollution, cf. the NPA section 76. For this claim the causative event is simply A's ownership of a polluting vessel. Similarly, it is A's ownership that gives the state authority to order the removal of the wreck, cf. section 37, cf. section 28.[69] All heads of losses that are a consequence of this causative event fall under the NMC section 172a, and are thus limited by section 175a.[70] However, when we move over

65 Cf. Solvang 2016 pp. 36ff.

66 If A later can turn around and claim these losses covered by another shipowner (X) with the right to limit liability, the same logic applies. In this "new case", the new shipowner's liability is determined by what "type of losses" are put forward by A. Then, in the same way as for A, X would be liable for both one section "175 amount" and one section "175a amount" towards A.

67 Best translated into Norwegian as "rettsstiftende faktiske forhold".

68 Selvig 2021 pp. 113ff provides a similar, but not completely the same, explanation.

69 The fact that A's liability is strict does not affect the validity of the reasoning, the same would have applied if liability additionally required fault.

70 Cf. Ot.prp. nr. 79 (2004–2005) p. 42.

to the replacement costs of the destroyed navigational aid, the causative event for the state's claim is different. Here it is A's negligent sailing of the vessel that leads to the vessel hitting the equipment that forms the basis of his liability towards the state, cf. the NMC section 151.[71] All heads of losses that are a consequence of this causative event fall under the NMC section 172, and are thus limited by section 175.

With these two different explanations being applied to the categorising of claims in scenario 1, we can move on to the seemingly more complicated scenario 2. As more parties are involved in this scenario, we have to distinguish between the claims made by the state against A, on the one hand, and the claims made by A against B, and B's counterclaim against A, on the other hand.

When categorising the claims made by the state against A, the exercise is the same as above for scenario 1. In this relationship, nothing has changed by introducing B.[72] As we know from section 3.2 above, under Norwegian law, the state is not in a position to make a claim (directly) against B for the costs related to the pollution from vessel A.

If we start with B's counterclaim against A for the damage to B's bow, we can all, I hope, quickly agree that this is a claim "in respect of [...] damage to property" that "arose [...] in direct connection with the operation of [A]", cf. the NMC section 172, regardless of whether we prefer one or other of the explanations discussed above. However, when it comes to A's claims against B, the two explanations lead to different results.

Under the "type of loss"-approach, A's claim against B for damage to or loss of vessel A, is a "property damage loss" – it is of this "nature" or "character", cf. the NMC section 172. Similarly, as above, the costs that A had to pay the state for the mitigation and clean-up measures, including A's own wreck removal costs, have not changed their nature or character just because A is now claiming that these costs be covered by B. Further, still entertaining this approach as the correct one, because it does not matter whether the claim from A against B for these costs is an "original" claim or a "derivative" claim,[73] since the costs are of the same nature, they then fall under section 172a. The consequence of this is that A's claim against B for these costs enjoys B's higher limitation amount in section 175a.

There are however some problems with this approach. In scenario 2, we should not be led into believing that A's claim against B for the mitigation and clean-up costs is a "derivative claim", in the sense of a recourse (or subrogation) claim.[74] Under Norwegian law, a key element of a derivative recourse claim is that the claimant has covered another's obligation.[75] However, when A paid the state's reimbursement claim, A did not cover B's obligation, for as we have seen, B is not liable vis-à-vis the state for the pollution from vessel A. A only covered his own obligation towards the state.[76] Furthermore, as long as B cannot be ordered to remove A's vessel, A's own costs for the wreck removal is an ordinary claim for damages for A's consequential losses.[77]

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71 Again, the reasoning would not be any different if the liability for running down the navigational aid were strict.

72 One could argue that the navigational aid in this scenario is destroyed by an act of necessity. Even if that were the case, A would still be liable towards the state.

73 Cf. the comment above on how the LLMC art. 2 no. 2 is implemented under Norwegian law.

74 Cf. fn. 60 above.

75 This is the case both where the claimant mistakenly thought he was liable, but also in instances where their liability is joint (*e. g.* surety). Cf. *i.a.* the Norwegian Supreme Court cases in Rt. 1997 p. 1029 (Mofrakt), HR-2017-2414 (Spiker) and HR-2021-61-A (Sikringsordning).

76 As noted in section 3.2, there are strong policy considerations behind why A's limit should be higher vis-à-vis the state (and other third parties affected by the pollution), but these considerations do not automatically transfer to the consequent relationship between A and B.

77 Selvig 2022 pp. 124–127.

If we change the scenario slightly so that damaged parts on vessel B fell off in the collision, and that, because the state thought that these parts belonged to vessel A, they included the clean-up costs in the reimbursement claim which A paid, then A would have a recourse claim against B. Precisely because A's claim is derivative in this scenario, *i.e.* it is a claim that should have been paid by B to the state, with B's higher limitation limits then applicable, A would enjoy the higher limits in the NMC section 175a. What we see here is that A's recourse claim is based on a different causative event than, for instance, A's claim for damages, *i.e.* A's mistaken payment of B's debt.

Some might say that the following reasoning is too abstract to be useful in the concrete analysis of whether a claim falls under the NMC section 172 or 172a. To my mind, however, this admittedly crude outline of some fundamental principles illustrates why we should focus on the causative event, and not on types of losses, when categorising claims.

The fact that A's claim against B for the wreck removal costs is a claim for damages, illustrates another problem with the "type of loss"-approach. By focusing on the "type of loss", there is a risk that we overlook the basic but important point: *what* is it that makes specifically B liable for A's losses and not somebody else? Further, *why* is it that A can claim these costs specifically from B? In scenario 2 it is B's negligent sailing of his vessel that links B to A. The collision caused by B's negligent sailing is what creates the bond between A and B. This "legally relevant fact", *i.e.* this causative event, accordingly explains why specifically *these two parties* are bound together. For A however, this bond, in and of itself, is without interest if the collision did not cause any damage or loss to A's vessel. It is when this is the case, *i.e.* the wrong has caused A to suffer a monetary negative effect, that A is interested in "pulling" on the bond to make B correct this negative effect by paying damages. It is only the negative effects caused by this specific event that A can claim be corrected by B. B's liability towards A does not however change, depending on the "type" of monetary effect the causative event has had. To the contrary, it is the causative event that determines whether B can be held liable for the particular "type" of loss that A is claiming.

The bond between A and B must, however, be distinguished from the bond between the state and A. In that legal relationship, the legally relevant fact that entitles the state to make a reimbursement claim against A is A's ownership of a vessel that constitutes pollution.[78] The latter causative event that creates a relationship (a bond) between A and the state does not affect the causative event in the relationship between A and B. If that were the case, B's liability would in principle be expanded, contrary to the rules in the NPA as we have seen above. Quite another issue is of course that of what heads of losses can be included in A's claim for damages against B. The question of whether A can claim consequential losses from B because of the collision does not however change the claim. It is still a claim for damages.[79] This is why I refer to this approach as the "type of claim" approach.

This "type of claim" approach is inspired by *i.a.* Peter Birks' classification of obligations.[80] However, I should emphasise that the focus here on *causative event* is not used to classify obligations, but to highlight the difference between the different claims being made and furthermore the different parties against whom these claims are made. We know that the legal basis for a claim is not relevant to the classification under either the NMC or the LLMC. The attention on the metaphorical bond between the

78 Because we do not want the state or other affected third parties to foot A's "pollution bill", we have enacted a higher limitation amount for this claim in accordance with the reservation against the LLMC.

79 Furthermore, the claim for damages does not change whether B is 100% liable or only 5% liable towards A. This only affects how much A can claim from B.

80 See *e. g.* Peter Birks, *Unjust Enrichment*, 2. Ed., Oxford 2005.

parties is inspired by both the approach to corrective justice by Ernest J. Weinrib in his works,[81] and also the view on obligations under Roman law.[82]

By isolating the different relationships that are created by the marine casualty in scenario 2, and more precisely, by isolating *what it is* that creates these relationships, we are hopefully in a better position to categorise properly the different claims under the NMC.

A's claim against B is based on B's negligent sailing of his vessel, and this remains the same, whether B is solely to blame for the collision, or only partly to blame. B's negligent sailing tore a hole in the hull of vessel A, which later caused the bunker oil spill from vessel A, cargo to fall off vessel A, and necessitated the purposeful grounding of vessel A. Even though the marine casualty had dramatic consequences for A, A can only point to the same causative event for his claim against B: B's negligent sailing. Accordingly, B's liability towards A "arose [...] in direct connection with the operation of the ship [B]", cf. the NMC section 172, with the limit in section 175 setting out B's maximum liability.

The state's reimbursement claim against A is, on the other hand, based as we have seen on A's ownership of a polluting vessel. Without being too repetitive: this claim, with its different heads of losses, falls directly under the NMC section 172a, with section 175a setting out A's maximum liability. Strong policy considerations support the higher limits in this relationship, but the same considerations do not apply in the relationship between the two shipowners. Once the state has had its full loss covered by A, the aim of the separate national limitation regime is achieved.

To increase B's liability, just because the collision caused vessel A to leak oil, lose cargo and become a wreck, compared to a situation where the collision "only" caused damage to vessel A that was then repaired, seems incoherent, given that it is the same reason which makes B liable in both scenarios. With this example, we are, hopefully, also able to accept my point that our sense of "fairness" should not affect our interpretation of the limitation rules. Whether B in scenario 2 is 100% or only 1% to blame for the collision, is neither here nor there when categorising A's claim against B.[83] An intuitive sense of "fairness" should however probably make it easier to accept the view argued for in this article, in the scenario where A is mostly to blame for the collision (and the consequences of this), rather than where B is solely to blame for the collision. These intuitions of fairness are however dealt with by our substantive law on whether B can be held liable in the first place. Where this is the case, the limitation rules, through a more or less coherent system, set out a maximum amount for B's liability. For the individual claimant that has his claim reduced, the impact of this system will obviously feel "unfair". However, the system is in place so that claimants in as many cases as possible will have their full loss covered through shipowners' liability insurance.

3.4 The Helge Ingstad-decision

Although the reasoning is not exactly the same as my reasoning above, the "type of claim"-approach to the construction of the NMC sections 172 and 172a is supported by the result in the *Helge Ingstad* decision from Hordaland District Court.[84] As this

81 See *i. a.* Ernest J. Weinrib, *The Idea of Private Law*, revised 2012 edition of the original 1995 edition, Oxford and *Corrective Justice,* Oxford 2012.

82 See *i. a.* Peter Birks, *The Roman Law of Obligations*, edited by Eric Descheemaeker, Oxford 2014, pp. 3–4 and Reinhard Zimmermann, *The Law of Obligations – Roman Foundations of the Civilian Tradition*, Cape Town – Wetton – Johannesburg 1992, p. 1.

83 Provided that B is to blame and, furthermore, as long as B has not caused the "loss deliberately or through gross negligence and with knowledge that such loss would probably result", cf. the NMC section 174, equalling the LLMC art. 4.

84 THOD-2021-58354.

decision is concerned with both the construction of the NMC and the LLMC, I will briefly deal with it here under section 3, in relation to the NMC, before moving over to the LLMC in section 4 below.

The decision was a result of the collision between the oil tanker "Sola TS" (in our scenario, vessel B) and the frigate "Helge Ingstad" (in our scenario, vessel A) in Hjeltefjorden, just outside of Bergen. The collision tore a hole in the hull of the frigate. "Helge Ingstad" caused bunker oil pollution and sank. A mitigation and clean-up operation was carried out and the wreck was later removed. "Sola TS" only suffered minor damage. The frigate was considered a total loss (amounting to 13 billion Norwegian kroner, equalling 1 234 369 500 USD) and the wreck removal operation was expensive (amounting to about 770 million Norwegian kroner, equalling 73 112 655 USD).[85] The owners of "Sola TS" declared their liability limited, by establishing a property damage fund in accordance with the NMC section 172, cf. section 175. When the state, as owners of "Helge Ingstad", made a claim for damages against owners of "Sola TS", the state argued that the part of the claim that related to wreck removal and clean-up costs could not be limited by this fund, but instead had to be limited in a separate wreck removal fund with "Sola TS'" limit set out in the NMC section 175a. The court decided in favour of "Sola TS".

As the rules on limitation of liability in the NMC are based on the LLMC, the court starts with an analysis of the LLMC. The court notes that at first glance, the wording of the LLMC art. 2 no. 1 letter (a) on the one hand, and the letters (d)-(e) on the other hand, seem to allow for an overlap. Thereafter, the court reviews the similar provisions in the 1957 Brussels Convention, which was confined to obligation and liability imposed by law, and emphasises that the provision in the LLMC was to be expanded to cover all wreck removal and clean-up claims, regardless of the legal basis. Despite this expansion of the LLMC, the court is of the view that there is nothing in the legal sources indicating that A's claim against B for the consequential losses related to wreck removal and clean-up should fall under LLMC art. 2 no. 1 letters (d) and (e). The court then emphasises that such a claim falls under the scope of the wording of the LLMC art. 2 no. 1 letter (a) when this provision is interpreted objectively,[86] and thereafter emphasises that it would make little sense to limit the scope of claims falling under letter (a) by expanding the scope of letter (d), when the "purpose behind the different provisions has been to make clear the different claims for which liability can be limited, independently of the legal basis for the claim".[87] Before moving over to the construction of the provisions in the NMC, the court concludes that the state's claim against "Sola TS" fell under the LLMC art. 2 no 1 letter (a).

Because the court's analysis of the NMC sections 172 and 172a, and the preparatory works leading up to these provisions, is so thorough, I will limit myself to a brief outline of the main points. The court strongly emphasises the policy considerations motivating Norway's reservation in accordance with the LLMC art. 18 no. 1 in 2002 (see section 3.2 above) and that a statement in the preparatory works relating to the moving of wreck removal and clean-up claims from the previous NMC section 172 to a new section 172a, was not meant to affect the interpretation of either. Furthermore, having concluded that the state's claim against the owners of "Sola TS" fell under the LLMC art. 2 no. 1 letter (a), and since Norwegian law was presumed to be in accordance with the convention when these provisions were implemented, the court emphasises this in favour of "Sola TS". Lastly, an objective interpretation of the wording of the NMC section 172 was seen to support this conclusion.

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85 With the conversion rate between NOK and USD on 12 March 2024.

86 The Court of Final Appeal of Hong Kong in the *Star Centurion* decision (see section 4.3 below) seems not to have had available a very good translation of the Norwegian decision, cf. para. 39 of that decision.

87 My translation.

It is not very surprising that the court does not explain the construction of the NMC by referring to theoretical considerations, as I have done in section 3.3 above. Nonetheless, the court's attention given to the difference between the claims made against the "polluting vessel" and this "vessel's claim" later on, including the former claims as heads of losses in this claim, supports the view argued for in this article. The distinction made in the NMC section 172 and 172a is between different claims, not losses. As noted above, the court interpreted the NMC to be in line with the LLMC. In section 4.1 we shall look more closely at the text of the convention, and in section 4.2, at recent case law related to the interpretation of this.

4 Wreck removal and clean-up claims under the LLMC and relevant case law

4.1 The LLMC's wording and the policy considerations behind the LLMC art. 18 no. 1

The wording of the LLMC art. 2 no. 1 letters (a) and (d)-(e) has already been set out in section 1.1 above. When comparing this with the English translation of the NMC section 172 and section 172a,[88] we see that the wording of these provisions is formulated in almost exactly the same way. It should come as no surprise therefore that these provisions should, in my opinion, be interpreted in the same way. Accordingly, in the collision scenario, B is entitled to declare his liability towards A limited under the LLMC art. 2 no. 1 letter (a), regardless of whether or not A's claim for damages also includes wreck removal and other clean-up costs. Similarly as under the NMC, B's liability towards A is based on the same causative event under the LLMC. There is no need to repeat my reasoning here, and I therefore to a large extent refer to the discussion in section 3.3 above. However, since the English version of the LLMC is the official version of the convention, our analysis of the wording should be more careful and detailed than the interpretation of the unofficial English version of the NMC.

Admittedly, the wording of the LLMC art. 2 no. 1 seemingly provides support for the "type of loss" approach, by referring to "(c)laims in respect of loss …" in letters (a)[89]-(c), "… consequential loss resulting therefrom" in letter (a), and "… minimize loss for which the person liable may limit his liability" in letter (f). The reference to "loss", when read together with "whatever the basis of liability" and art. 2 no. 2 from which it follows that "(c)laims set out in paragraph 1 shall be subject to limitation of liability even if brought by way of recourse or for indemnity …" can be said to indicate that it is A's type of loss that is decisive and not A's type of claim. Consequently, when A makes his claim for damages against B for A's wreck removal and clean-up costs, the losses are still of the same type, even though the legal basis is different. At first glance, the wording of the LLMC seemingly supports a construction where all costs and expenses related to wreck removal and clean-up fall under letter (d) and (e).

On the other hand, letters (d) and (e) do not speak of "loss" in relation to wreck removal and clean-up measures but "(c)laims in respect of …". It is interesting to note that in the two provisions from which reservations can be made, the focus seems to be more on the "type of claim" than on the "type of loss". This difference is, in my opinion, important. As we have seen above in section 3.3, when public authorities and other third party claimants (*e.g.* private owners of quays or basins) make a claim against A, this claim is based on the fact that vessel A is a wreck and/or has caused pollution, not on the preceding facts that caused vessel A to become a wreck. These claims can be made against A regardless of whether vessel A grounded due to navigational errors or a collision with B. Furthermore, this does not change depending on the legal basis for the third parties' claims against A. A's liability for wreck removal will typically be strict liability based on statute, but it is conceivable that claimants other than public authorities will need to base their claim on, for instance, negligence by A.[90] A's later claim against B, however, can

88 Cf. section 3.3 above.

89 Note that "loss" here also can refer to physically lost, cf. Berlingieri p. 60.

90 In Norway, both public authorities and private individuals are protected by the strict liability set out in the NPA.

only, as a consequence of the Brussels Collision Convention 1910, be based on "fault-based" liability.[91]

In addition to the text of the LLMC art. 2 no. 1 letter (d) and (e) referring to "claims" and not "losses", we should not forget that the heading of art. 2 speaks of "Claims Subject to Limitation".

Although the language of the convention is admittedly not entirely clear, in my opinion the language favours the "type of claim"-approach.

This view is in my opinion supported by the preparatory works to the LLMC. It should first be noted that the *travaux préparatoires* do not specifically deal with the issue at hand. Accordingly, little direct support for either view can be derived from the *text* of the preparatory works. However, what is clear from the preparatory works is that the member states wanted to avoid situations where a member state's public authorities and/or other third parties end up footing the bill for wreck removal and clean-up measures, by letting the "polluting" shipowner limit his liability.[92] The perception that this public policy consideration was the motivating factor for letting member states make reservations against the LLMC art. 2 no. 1 letters (d) and (e) should be uncontroversial.[93] That we clearly know the underlying rationale, and therefore also the core cases falling under the LLMC art. 2 no. 1 letter (d) and (e), is of some significance when deciding whether A's claim against B falls under these two provisions, or instead under the LLMC art. 2 no. 1 letter (a). Shipowners have a right to limit their liability under the LLMC. This system is, as we have seen, based on economic efficiency and the "general fairness"[94] that is achieved by making shipowners' liability insurable. When shipowners have this right, and the P&I insurance market is based on shipowners having this right, courts should in general be careful with expansive interpretations for situations that are not core cases. An expansive interpretation of the LLMC art. 2 no. 1 letters (d) and (e) obviously restricts shipowners' right to limit their liability correspondingly, in accordance with the LLMC art. 2 no. 1 letter (a). The fact that we know the purpose behind letting member states make reservations against the LLMC art. 2 no. 1 letters (d) and (e), but strictly speaking, there is nothing on the issue at hand in the preparatory works, is in my opinion an argument in favour of an interpretation that supports the purpose behind the limitation system as such, rather than a conceived purpose of the LLMC art. 18 no 1. This should especially be the case when the aim of avoiding public authorities and other third parties footing the bill for wreck removal and clean-up measures is achieved through this interpretation.

Presumably, an underwriter who underwrites the risk for the bulker vessel A in our example calculates on the basis of the vessel being specifically a bulker vessel, and not an oil tanker. However, with the "type of loss"approach, vessel A's exposure will include the risk of oil spill from the tanker B in a scenario where A tears a hole in the hull of B. B's liability towards the public authorities and other affected third parties will fall under the CLC, but when B makes a claim against A for the costs and expenses related to the clean-up measures, these losses' "nature" falls under the LLMC art. 2 no. 1 letter (e). It is hard to believe that the increased exposure will not increase A's premium. With the "type of claim" approach, one avoids this risk by the exposure always being related to the particular vessel's type and gross tonnage.

From this brief review of the text of the convention and the preparatory works, it is understandable that various courts construct the convention differently. Neither the convention text, nor the preparatory works, clearly "dictate" the "type of claim" approach argued for in this article. As we shall see in section 4.2 below,

91 Under Norwegian law: the NMC section 161.

92 This is supported by the discussions related to the LLMC art. 6 no. 3, cf. Berlingieri pp. 203ff.

93 Cf. *i. a.* Griggs *et. al.* 2005 pp. 22ff, Williams 2007 pp. 294ff and Gutirrez 2011 pp. 101–102.

94 *I. e.* not fairness in the individual case where liability is limited, but fairness in the sense that the likelihood of claimants having their losses covered in full is higher.

three final appeal decisions from jurisdictions other than Norway, favour the "type of loss" approach. When I argue, however, that these should not be followed in the future, this view is based on the following points. First, the convention text distinguishes between *claims*. It is claims that shall be categorised, and that the legal basis for the claim (*e.g.* statute, tort or contract) is "irrelevant", does not affect this. Although the convention text is not entirely clear, the language of letters (d) and (e), when read in isolation, supports this view. Secondly, the interpretation of the text should not undermine the purpose behind the limitation system. It is not evident that the purpose behind the LLMC art. 18 no. 1 is to allow A a separate wreck removal claim with the higher limits[95] against B in our scenario 2. However, what is evident is that the purpose is to allow public authorities and other third parties affected by A's "pollution" to have their full loss covered when making a claim for this against A. When this aim is achieved even where A's claim against B "only" falls under the LLMC art. 2 no. 1 letter (a), this construction should be chosen, since it respects B's right to limit his liability for the consequences of his operation of the ship.

4.2 Case law on the interpretation of the LLMC art. 2 no. 1 letters (a), (d)-(e)

As mentioned above in section 1.2, the interpretation argued for in this article runs counter to three final appeal court decisions on the construction of the LLMC art. 2 no. 1 letters (a), (d)-(e). In the *Amasus*[96] and *Eitzen*[97] decisions from the Supreme Court of the Netherlands and the *Star Centurion*-decision from the Court of Final Appeal of Hong Kong, the question of what would equal A´s claim for damages against B for wreck removal and clean-up costs in our scenario 2 is concluded to fall under the LLMC art. 2 no. 1 letter (d) (and (e)). Simply by being apex court decisions, they will obviously carry weight if the same issue arises in other member states. However, the courts of other member states will need to construct the convention text independently and will obviously have regard to particular national legislation on the issue.

Even though the careful analysis of the wording in the LLMC in the *Star Centurion*-decision is persuasive, the Court of Final Appeal, in my opinion, too easily concluded on the purpose behind the LLMC art. 18 no. 1 and with the facts being as they were in the case, it is difficult not to get an impression that the "innocence" of the claimant at least partly influenced the decision. Before moving to the *Star Centurion* decision, we should briefly look at the *Amasus* and *Eitzen* decisions.

In *Amasus*, the two vessels "Wisdom" (owned by Amasus) and "Riad" (owned by Riad) collided on the river Oude Maas, with Riad, together with its cargo, sinking. The Dutch State invoked the Wreck Act against "Riad" and instructed a salvor to remove the vessel and its cargo. Once removed, the state sold the wreck and the cargo was discharged to a site belonging to the state. To have its cargo released, a company named ELG issued an on-demand guarantee for the state's costs related to wreck and cargo removal, and after having paid under the guarantee, ELG held both "Amasus" and "Riad" liable for the salvage costs and all other consequential losses caused by the collision. "Amasus" established a so-called wreck fund. Similarly to Norway, under Dutch law the limitation amount equalling the wreck fund was higher due to the Netherlands reservation against the LLMC art. 2 no. 1 letters (d) and (e).[98] "Amasus" argued that its liability against ELG should be limited under the lower limitation amount, sinceas the claim fell under the LLMC art. 2 no. 1

95 Or unlimited, depending on the national legislation.

96 *Scheepvaartbedrijf MS Amasus BV v ELG Haniel Trading GmbH* (ECLI:NL:HR:2018:140).

97 *Eitzen Chemical (Singapore) Ltd v VOF G Idzenga Scheepvaartbedrijf* (ECLI:NL:HR:2018:142).

98 In 2019 the liability for wreck removal was made unlimitable under Dutch law.

letter (a). The Supreme Court of the Netherlands did not agree with "Amasus". ELG's claim against "Amasus" was held to fall under the LLMC art. 2 no. 1 letters (d) and (e). Before making some comments on the summary of the reasoning,[99] I set out the facts of the *Eitzen* decision. Both were decided on the same day.

In *Eitzen*, the chemical tanker "Sichem Anne" collided with the container vessel "Margreta". "Sichem Anne" created a hole in the hull of "Margreta", with the latter starting to sink. "Margreta" was put aground to avoid further sinking. The vessel and its cargo was salvaged. Both vessels declared their liability limited by establishing property damage funds. "Sichem Anne" declared its liability for "Margreta's" salvage costs limited under this fund, whilst "Margreta" argued that the liability for these costs would have to be limited by establishing a wreck fund with higher limits. The Supreme Court held that the higher limits would apply for the salvage claims against "Sichem Anne" in the event that there was liability, *i.e.* the indemnity claim fell under the LLMC art. 2 no. 1 letters (d) and (e) and not letter (a).

The English summaries of the court's reasoning are brief, but the rationale for the decisions seems to be much the same in both cases.[100] The summaries leave an impression that it had been argued by Amasus and Eitzen that the reservation against the LLMC art. 2 no. 1 letters (d) and (e) only applied to claims made by public authorities. In relation to this, much emphasis seems to have been put on what is referred to as being the purpose behind the reservation. The purpose motivating the reservation is said to be to ensure the safety of maritime traffic, and that this interest can be served by parties other than the public authorities carrying out wreck removal and clean-up operations.

If it is correct that this was the decisive factor for the decisions, it is hard to disagree with the obvious point that wreck removal and clean-up costs might be carried out by parties other than the public authorities, and that these parties' interests were intended to be protected by the LLMC art. 18 no. 1. However, as we have seen in relation to Norwegian law, this aim is still achieved, provided these parties' claims against the owner of the "polluting" vessel (vessel A in our scenario) fall under the LLMC art. 2 no. 1 letters (d) and (e). It does not of course matter whether the claim is made by public authorities or by other third parties. Once these parties have had their wreck removal and clean-up claims covered, the purpose is achieved, and this does therefore not support the argument that B's liability should be higher for A's claims against B. What we see is that the "type of claim"-approach does not limit the LLMC art. 18 no. 1 to applying only to claims made by public authorities, but instead clarifies *which* claims are made against *whom*. This point might be obscured by solely focusing on the "type of loss".

Similar reasoning is apparent in the *Star Centurion* decision.[101] The facts in this case perfectly illustrate how the construction argued for in this article might seem "unfair" and "unreasonable". Here, the vessel "ANTEA" collided with the vessel "Star Centurion", while the latter was anchored in Indonesian waters. "Star Centurion" became a total loss and the owners were ordered by Indonesian authorities to remove the wreck and render it harmless. The parties agreed that "ANTEA" was solely to blame for the collision. They also agreed that Hong Kong law applied. Hong Kong has made a reservation against the LLMC art. 2 no. 1 letter (d), with liability for wreck removal claims being unlimited. The owners of

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99 Unfortunately, I have had to refer to English summaries of the decisions available through the Centre for Maritime Law, Faculty of Law, National University of Singapore: Amasus: https://cmlcmidatabase.org/scheepvaartbedrijf-ms-amasus-bv-v-elg-haniel-trading-gmbh (last visited 4 March 2024) and Eitzen: https://cmlcmidatabase.org/eitzen-chemical-singapore-ltd-v-vof-g-idzenga-scheepvaartbedrijf-0 (last visited 4 March 2024). Accordingly, in addition to not being qualified in Dutch law, there might be nuances in the decisions that I have overlooked.

100 Cf. fn. 98 above.

101 *Perusahaan Perseroan (Persero) PT Pertamina v Trevaskis Limited and others* [2023] HKCFA 20.

"ANTEA" declared their liability limited and argued that both these costs and the loss of "Star Centurion" fell under the LLMC art. 2 no. 1 letter (a). As the wreck removal and clean-up costs were significant, little would be left for the loss of "Star Centurion" if "ANTEA's" liability towards "Star Centurion" solely fell under the LLMC art. 2 no. 1 letter (a). All instances in Hong Kong concluded that the wreck removal and clean-up costs had to be separated from the loss of the vessel, with the consequence that "ANTEA's" liability was unlimited with respect to "Star Centurion's" claim for damages for these heads of losses.

It falls outside the scope of this article to comment on every point in the very thorough decision from the Court of Final Appeal. A couple of comments should however be made on some problematic parts of the decision.

First, although the wording of the last passage of para. 30 could be argued to contradict the rest of the reasoning related to the wording of the LLMC art. 2 no. 1 letters (a) and (d), it is clear that the court is of the opinion that the list in LLMC art. 2 no. 1 refers to types of losses/costs, and not to types of claims. The court emphasises that "in respect of" is "used to indicate connection between *a kind of loss or expense* and a *claim to recover that loss or expense* suffered against a shipowner",[102] and further emphasises that the "plane on which the relationship between the claim and the *factual basis of occurrence of the loss or expense* in respect of which the claim is made" is not altered by the basis of the claim for wreck removal.[103] Accordingly, the court is of the view that the LLMC art. 2 no. 1 letter (d) must be constructed as referring to *matters of fact,* and not to a particular class of claimant or legal rights of the claimant. As mentioned above in section 4.1, whilst this interpretation is supported by the wording of the "rest" of the LLMC art. 2, it does not, strictly speaking, follow from letter (d) when read in isolation. However, the wording of LLMC alone admittedly allows for both interpretations.

Secondly, similarly to the Supreme Court of the Netherlands, the court "extends" the purpose behind the member states' right to make reservations against the LLMC art. 2 no. 1 letters (d) and (e) in paras. 35–40. In this part of the decision, the court rejects the argument that letter (d) should be read as only applying to wreck removal claims from harbour authorities. It is hard to disagree with this. Neither the language of the LLMC, nor the preparatory works, support such a narrow interpretation. However, this conclusion does not automatically lead to shipowner A's claim against shipowner B for the collision falling under letter (d). As we have seen, as long as public authorities and other third parties have their claim covered when making a claim against the "polluting" shipowner, the clear aim behind the LLMC art. 18 no. 1 is achieved. In this case, if Indonesian authorities carried out the wreck removal and claimed the expenses from "Star Centurion", the owners of "Star Centurion" would have to reimburse the Indonesian state in full.[104] When we do not know more from the *travaux préparatoires* about the extent of the reservation, but do know the core area and principal aim, and that an extensive interpretation of the LLMC art. 2 no. 1 letter (d) correspondingly minimises the shipowners' fundamental right to limit their liability, courts should be careful in making broad and general statements as to the purpose supporting the "type of loss" approach.

Thirdly, the court emphasises the danger that an "innocent shipowner" will be discouraged from carrying out wreck removal, if his claim for these costs against the other shipowner is limited. To my mind, this is not a weighty argument for the following reasons: Firstly, deliberately not carrying out a wreck removal order will often be a criminal offence, and the emphasis on this danger contributes to hiding the fact that the "polluting" shipowner's liability for wreck removal is covered

102 Para 33 (my emphasis).

103 Para 33 (my emphasis).

104 In practice, the owners' P&I club.

by P&I insurance.[105] Secondly, the reference to the "polluting shipowner" being "innocent" is problematic, since this is neither here nor there when applying and construing the limitation rules. The substantive law on division of liability deals with "innocence" and "fault/blameworthiness". The fact that "Star Centurion" was innocent seems to have influenced the decision,[106] and even though it is easy to understand and sympathise with this, it is unfortunate that such considerations influence the interpretation of rules based on economic efficiency and predictability for insurers. In a new case where a vessel like "Star Centurion" is 99% to blame for the collision,[107] the (almost) "innocence" on "ANTEA's" side could tilt the scale in the other direction. That would be unfortunate. However, my point is that such considerations should not be on the scale in the first place.

Fourthly, it is not easy to follow the court's distinction between damages for wreck removal costs and damages for "salvage costs" in paras. 54–58. The court here refers to the English cases in which it has been held that, although a salvage claim is unlimited under the LLMC art. 3 letter (a), when salvage expenses have been paid to the salvor in full but are later included in a claim for damages as consequential losses, these costs fall under the LLMC art. 2 no. 1 letter (a).[108] It is difficult to disagree with this latter claim not being a claim for salvage reward, but instead just an ordinary claim for damages for *e.g.* a collision, but then it is hard to see how a claim for wreck removal is any different from this. The wording in LLMC art. 3 letter (a) reads as follows: "Claims for salvage or contribution in general average".[109] When comparing this to "Claims in respect of raising, removal …" in the LLMC art. 2 no. 1 letter (d), it is not easy to see that this provision, at least from its wording, "refers to kinds of loss or expense incurred in fact",[110] more than the provision in the LLMC art. 3 letter (a). For me it is hard to see that "claims for" is any different from "claims in respect of". The parallel to the LLMC art. 3 letter (a) is, in my opinion, important. The policy consideration explaining this exception from the right to limit liability, is that salvors would be discouraged from carrying out salvage if they knew that their reward would be limited. However, once this aim has been achieved, the purpose underpinning the exception should not be extended to minimise shipowners' right to limit their liability. As we have seen, this is no different for wreck removal claims.

Even though the decision in *Star Centurion* is thorough, similarly as the two decisions from the Supreme Court of the Netherlands, it is illustrative of how the "type of loss" approach can obscure the different claims that arise as a consequence of a collision, and *who is* liable for *what.* As long as the wording refers to "claims in respect of", and as long as the aim with the LLMC art. 18 no. 1 is achieved by the "type of claim" approach, and for the reasons set out above, it is submitted that the *Star Centurion* decision should not be followed if the same issue were to arise in another member state to the LLMC unless the convention is changed.[111]

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105 It would accordingly not matter if the owners of the Star Centurion were insolvent. In fact, it is often a requirement under the P&I conditions that the assured is insolvent for a claimant to make a direct action claim against the insurers (for instance the Indonesian state if the "Star Centurion" had not carried out the wreck removal).

106 See especially paras. 35, 40, 49 and 54.

107 It is not practical for the division of fault in a collision to be divided 99/1, but I use the example to prove a point.

108 The "Breydon Merchant" (1992) 1 Lloyd's Rep 373 and The "Aegean Sea" (1998) 2 Lloyd's Rep 39.

109 Revised by the 1996 Protocol art. 2 to read: "claims for salvage, including, if applicable, any claim for special compensation under article 14 of the International Convention on Salvage 19892, as amended, or contribution in general average".

110 Cf. para. 57.

111 Cf. Gutiérrez 2011 p. 102 and pp. 217–218.

5 Concluding remarks

I have argued above that when constructing the NMC sections 172 and 172a and the LLMC art. 2 no. 1 letters (a), (d)-(e), the courts should follow what I have referred to as the "type of claim" approach, rather than the "type of loss" approach. By following this approach, it is easier to see that A's claim against B in our scenario 2 is *one* claim for which B is entitled to limit his liability, and that this does not change due to the economic consequences on A's side. There is something peculiar about the LLMC art. 2 no. 1 being concerned with "losses in fact", when the convention covers limitation of liability for *maritime claims*. I suspect that the approach favoured by the Supreme Court of the Netherlands and the Court of Final Appeal of Hong Kong is, at least in part, influenced by the fact that A is "innocent". A result where the innocent shipowner A obtains full cover from the "blameworthy" shipowner B for his wreck removal and clean-up costs, undoubtedly feels more "fair".

It is understandable that courts wish to reach conclusions that are "fair" in the individual case. However, when interpreting rules that are parts of a more or less coherent system that might be said to be unfair by definition, the courts should try to avoid emphasising "individual fairness", influenced by the facts in the specific case. What is fair in one case is not necessarily fair in the next, when the facts are turned upside-down. The substantive law on liability deals with this. The limitation rules are only relevant once the substantive rules have imposed liability, and then the limitation rules only set out maximum economic limits. By keeping this in mind, it is more likely that the interpretation of the rules will be more predictable. In principle, predictability should make the liability easier to insure. Increased insurance capacity makes it easier to increase the maximum limitation amounts.[112] This again makes it more likely that the claimant will achieve payment in full.

[112] Cf. the debate in Berlingeri pp. 21ff.

The Norwegian Ship Registers – the transformation to electronic registration

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Content

1 Introduction

1.1 From paper based district registers to one register with electronic registration

The necessity of having a registration system for ships – for public law as well as private law reasons – has long been acknowledged. It suffices here to mention the Act on Ship Registration of 1901, based on district registration for Norwegian owned ships. A long required amendment was made in 1972 when the rules were upgraded and transferred to the Maritime Code (MC) – the present one dated 24th June 1994 No. 39. One important further step was taken in 1992, when a centralized edb-register was established, and gradually electronic documents were then introduced. And the final step in this direction is the amendments made in 2023[1], which are the topic of this article.

1.2 The three registers today

Today we have three registers for ships:

I the traditional register for Norwegian owned ships (including pleasure craft) – the NOR-register,[2]
II the shipbuilding register, also regulated by the Maritime Code, and
III the international ship register – NIS – which is regulated by an Act of 12th June 1987 No. 48.[3]

1.3 The importance of the rules on land registration

The rules on ship registration have much in common with the land registration rules, and over different periods, the one has had more modern rules than the other. In the development of rules on electronic registration, the land rules have been ahead, and the amendments of 2023 are to a great extent in conformity with the land rules. In the *travaux préparatoires* to the ship register amendments of 2023, there are a number of references to the land register rules.[4] This connection therefore calls for a short survey of the land registration rules:

There are two registers for land property. One is primarily for public law reasons: the Land Register (Norwegian: "matrikkelen") with its legal basis in the Land Registration Act of 17th June 2005 No. 101. In this register every property, as defined in the Act, has a "page" in the electronic register, where its physical characteristics are described, in particular the geographical boundaries. The other register is the Register of Deeds (Norwegian: *tinglysingsregisteret* or *grunnboken*) serving private law interests, see the Act on Registration of Deeds of 7th June 1935 No. 2. The Register of Deeds has gradually become electronic, with an electronic register where each property has its own "page", and with the possibility of having rights in the property registered electronically. By the end of 2023, it is expected

1 The Act 115/2023), with *travaux préparatoires* Prop.129 L (2012–2023) (based upon a letter of hearing of 2ndMarch 2021) and Innst.59 L (2023–2024).

2 In 2022 the total number of ships (including pleasure craft) registered was 20,361, of which 899 were merchant ships, 4,847 fishing vessels, 10,166 pleasure craft, and 4,449 other NOR vessels. Registered encumbrances amounted in 2022 to NOK 2,288,000 millions. The figures are taken from the 2022-year report from the Norwegian Maritime Authority.

3 In 2022 the NIS-fleet consisted of 735 ships with a total gross tonnage of 17,594,035. Registered encumbrances were in 2022 NOK 3,692,000 millions. The figures are taken from the 2022-year report from the Norwegian Maritime Authority.

4 See Prop. 129 L (2022–2023) p. 10: "In the present proposal the Ministry has, therefore, to the extent possible and relevant for ship registration, proposed solutions that are close to those in the Act on Registration of Deeds."

that 75 percent of the registrations will be electronic. The important last step for this change to electronic registration was taken by an Act of 2014 (20th June 2014 No. 45), in force as from 18th April 2017.

1.4 A survey of the presentation

In this article, the focus is on the NOR and NIS and their gradual transformation from paper based systems to electronic ones, although retaining the possibility to have paper documents registered. An important step forward has, as indicated, been taken by the law amendments of 2023 (Act 115/2023), in force as from 1st January 2024.

In 2, 3 and 4 below, the discussion relates to the NOR; some special remarks concerning the NIS come in 5. A short presentation of the traditional paper based registration system is given in 2, since the paper registration will still exist as a possible alternative under the new rules. In 3 an indication is given of the gradual transition to the use of the electronic possibilities for registration. In 4 there is a broader survey of the 2023 amendments: what are the implications for NOR-registration? The two special forms of registration: regarding newbuildings and bareboat charter parties, require some words in 4.8 and 4.9. In 5 clarification is given on whether the 2023 amendments are relevant for registration in the NIS. Finally, in 6 a proposal from the Norwegian Maritime Authority to establish a special small boat register is briefly described, to the extent that such a register will have an influence upon registration in the NOR.

2 A short presentation of the main rules of the paper based registration system[5]

A natural starting point is the time when the national register was introduced, as mentioned by an Act of 1992. The local ship registers, administered by 27 district courts, were consolidated into one register, located in Bergen.[6] This national register was electronic, but registration was based upon paper documents, as were the certifications given by the Registrar. However, in 2020/2021 it became permissable to send certain documents electronically for registration.

2.1 The duty and the option to register

In contrast to the Register of Deeds for land property, there has, since 1901, been a duty on the owner to have his ship registered, depending upon two factors (MC Section 11 second paragraph): the owner's nationality and the physical character of the ship. The principle in 1901 was that a Norwegian owner – with stringent rules on nationality – was obliged to register a ship with a length of 15 meters or more. The nationality factor has since then been substantially modified: today, the obligation is to register in Norway in the NOR or NIS unless the ship is registered abroad (MC Section 1).

The Norwegian owner has, however, the option to register ships that do not come within the obligatory registration category, see MC Section 11 paragraph three:

> *"A Norwegian ship with a maximum length of less than 15 meters can, at the owner's request, be entered in the Ship Register if its overall length is at least 7 meters or if the ship is required to be registered under Act 26 March 1999 No. 15 Relating to the right to participate in fishing and catching (Participant's Act") or if it is to be used exclusively or mainly in trade. When such a ship is entered in the Ship Register, the provisions of this Chapter [Chapter 2] shall apply."* [7]

Registration follows from the owner's request (MC Section 12), supported by information/documentation listed in MC Section 13. Once the ship is registered, there is a duty to notify the registrar if there is a change, e.g. concerning ownership.

2.2 Entries in the Register

In addition to the information indicated in 2.1, rights in the ship can be registered – which is fundamental in our context. The main rule is in MC Section 20 paragraph one:

> *"A document can be noted in the Ship Register the purpose of which is to create, modify, assign, pledge, acknowledge or terminate a right in the registered ship. Documents relating to a maritime lien on a ship or lease* [8] *or chartering of a ship are exempted."*

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5 For the details, see Falkanger, Bull and Brautaset, *Scandinvian Maritime Law* (4thed. 2017) pp. 55 et seq.

6 At that time, the Register was administratively under the Ministry of Foreign Affairs. Today the Register is part of the Norwegian Maritime Authority subordinated to? the Ministry of Trade, Industry and Fisheries.

7 The translations from the MC (before the 2023 amendments) are taken from MarIus No. 435 (2014), and Regulation 593/1992 (prior to the 2023-amended) is an official translation. The other translations are the author's responsibility.

8 On registration of bare boat charters, see 4.9 below.

Such a right, appearing from a paper document, must comply with a number of rules, which contribute to the authenticity of the right. Of the rules on requirements for registration, MC Section 21 paragraph one should be mentioned. This paragraph defines "title of ownership" as being he who appears as owner in the Register. or who can show that the title passed to him upon the death of the owner, and paragraph two says:

> *"For a document to convey a title of ownership for the purposes of the Register, the document must show an unconditional transfer of property, or, if the transfer is conditional, the fulfilment of any condition must either be shown by proof duly registered or be a matter of common knowledge."*

Furthermore, the general rule in Section 22 is:

> *"A document evidencing the voluntary establishment of a right as mentioned in Section 20 paragraph one cannot be noted in the Ship Register unless the issuer has a registered title or the consent of the holder of such title."*

A practical illustration of this is that a mortgage cannot be registered (noted in the Register) without the cooperation of the titled owner. As for an execution lien, the execution authorities have to decide whether the owner of the ship is a debtor for the pursued claim, and if they do so decide, the lien can then be registered.

2.3 The effects of registration

We shall not investigate the effects of complying or disregarding the *obligation* to register a ship, these being questions of public law. Regarding private law, the starting point is that between the parties to a right, registration does not alter either party's position.[9] Registration is relevant in relation to protection against third parties.[10] The basic rule is that the right first registered has priority over rights registered later or not at all. However, if the holder of a voluntary created right knew or ought to know at the time of registration that there existed an older right not registered (and so was not acting "in good faith"), the older one has priority – regardless of whether the older one is a voluntary right or not. Registration may also lead to legal extinction when we have an older right that is incompatible with the registered one. An example, if A acquires a ship and at the time of registering his title no encumbrances were registered (and A was in good faith), existing encumbrances are extinguished. The holder of an execution lien and the bankruptcy estate are entitled, however, to rely on the time of registration; knowledge of older non-registered rights is immaterial. The creditors have one further advantage: if a voluntary right is registered at the same time as an execution lien or an arrest decision, the non-voluntary right ranks first, and in the event of bankruptcy the general rule is that in order to be respected by the bankruptcy estate, the right must be registered at latest the day before bankruptcy was declared.

The above concerns competition between rights deriving from the owner of the ship. Registration is also of importance when the owner's position is contested – e.g. a previous owner contends that the transfer of ownership to A is invalid, and consequently that the mortgage that A has issued to B is invalid. Section 26 has rules on such an issue:

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9 The formalities required for registration and the Registrar's scrutiny of the document may of course have important evidentiary effect.

10 Prop. 129pg in the second sentence "The Register's positive credibility is that one is entitled to assume that the information in the Register is correct. The negative credibility is that one who enters into a contract with the titled owner is entitled to assume that encumbrances which are not in the Register are not relevant."

> *"No objection that a registered title derives from an invalid document can be raised against any person who has registered a right contractually acquired by him from the registered holder of the title, and who acted in good faith when entry in the journal was made. However, such objection can be raised if the document is forged or falsified or is void by reason of minority or was made under duress, cf. Act Relating to Conclusion of Agreements Section 28."*

When a document for registration arrives at the Register, it is entered into "the journal of documents" according to "the day and minute when it was received for registration" (MC Section 14), and an extract of the document is temporarily noted on the ship's page in the Register. The Registrar will check the document and attachments (MC Section 15 has a number of requirements regarding the contents of documents and attestations of signatures etc.). If the requirements for registration are not complied with, registration will normally be refused and the document returned (with possibility of appeal according to MC Section 19), and the temporary note in the Register will be deleted. When everything is in order, the document shall be noted in the Ship Register, i.e. the temporary qualification is deleted. The document sent for registration is then returned to the person who presented it, or to a person designated by him (MC Section 14 paragraph four). On registration, a certificate of registration is added to the document (MC Section 17). The priority depends upon the time of entry in the journal of documents (MC Section 23 paragraph two) upon initial receipt of the document for registration, not the time when the temporary qualification in the Register is deleted. The time of entry is more precisely defined in Regulation 593/1992 Section 11:

> *"Documents shall be entered in the journal consecutively according to the date and time when they are received for registration. Documents reaching the Registrar in the same mail shall be regarded as having been received at the same time. Documents arriving by morning mail shall be regarded as arriving at 10.00 hours. The document journal number, date and time shall be noted on the document."*

2.4 Amendments and deletions

For amendments, e.g. of the sum secured under a mortgage, the procedure is as indicated above. There are detailed rules on deletion from the Register: of ships (Section 28), of encumbrances (Section 29), and deletion due to time-barring (Section 30). Of these rules, only one is mentioned here:

> *"For a mortgage deed that is a negotiable debt instrument to be deleted, the document must be submitted to the Registrar together with a receipt or consent" (Section 29 paragraph two first sentence).*

2.5 Access to the information in the Register

The information in the Register is accessible to the public:

> *"Any person shall be entitled upon request to receive a certificate of the ownership of and encumbrances on a registered ship" (Section 17 third paragraph).*

3 The gradual introduction of electronic procedures

As indicated in 1.1 the fundamental organizational change in 1992 led to an electronic register domiciled in Bergen, however with registrations still based upon paper documents. At that time the International Ship Register, established in Bergen in 1987, had an electronic register – with registration based on paper documents. In 2019 the possibility of sending certain documents electronically was introduced in both registers.[11]

Registration of mortgages e.g. had still to be paper based – in contrast to the Register of Deeds that had (as said in 1.2) electronic registration as the main rule.[12] The NOR and NIS were sagging behind! This was corrected by the act of 2023.

11 Regulation 2201/2018 amending Regulation 593/1992 Section 4 ("The register can be established electronically") and also Section 25 ("documents submitted electronically").

12 See Act 45/2014 where the results of a limited test with electronic registration, were so encouraging that electronic registration became the principal method.

4 Outline of the new ship registration rules

4.1 Introduction

The new rules on electronic registration do not (as indicated in 1.3) preclude paper registration. In 4.2 to 4.6, the description is limited to electronic registration. The relationship between the paper rules and the electronic registration is postponed to 4.7. In 4.8 and 4.9 there are some remarks on registration of newbuildings and bareboat charter parties.

4.2 The electronic registration rules

The new rules on electronic registration are, first of all, in MC Section 15, where a new paragraph two modifies the paper based registration rules in paragraph one:

> *"The document can be sent in an electronic form and in accordance with the procedure stated by the Ministry in a regulation. Any requirement regarding the form of writing, in law or contract, does not act to prevent such electronic sending. When sending a document in an electronic form, a safe method that authenticates the sender and secures the integrity of the contents shall be applied. The Ministry will determine by way of a regulation the requirements for electronic communication regarding registration, here follow rules on signing, witness attestation, authentication, integrity, use of electronic certificate and confidentiality and rules on requirements in respect of products, services and standards that are necessary for such communication, and rules on liability for the issuer of certificates."*

However, the 593/1992 Regulation has not been amended, apart from Section 30, that now says:

> *"In connection with major works of maintenance or system changes the Maritime Directorate may close the reception and registration of electronic and paper based documents during the period considered necessary for the work to be performed. Paper documents which arrive during the period of closure will be considered received at the time when the period of closure ends.*
>
> *The Maritime Directorate shall inform the users on planned closures, if possible in good time.*
>
> *In the event of unexpected system interruptions, the Maritime Directorate may close the registration of paper based documents. Electronic documents delivered during the interruption are not considered received at the time of delivery. In case of conflicting legal rights submitted during the period of closure, these are entered into the daily journal at the same time and are of the same standing."*

4.3 Who is entitled to register electronically?

Professional entities – not individuals – are entitled to register electronically in the Register of Deeds, provided they have an agreement with the Register on "access to and use of a system for electronic registration". From the standard agreement, covering eight pages, parts of Clause 4 on the user's obligations should be quoted:

> *"The user shall have an accessible technical solution compatible with the system the Register of Deeds has developed and uses for electronic registration. The Register determines the form and layout of electronic documents sent for registration, hereunder the contents of such documents and the procedure for correct filling in of information ...*

The user must make secure transmissions to the Register using a safe method. The Register determines what is considered a safe method based on the current safety evaluation ...."

In contrast, the *travaux préparatoires*[13] to the 2023 amendments say that electronic registration in the Ship Register shall be open for anyone; one important argument for this being the number of pleasure craft listed in the Register. The *travaux* also stated that an intuitive and user-friendly gateway was to be developed:

"A standard condition will be that access to the system as regards signing of title and mortgage documents requires the sender to log in by way of secure identification, either with Bank-ID or other electronic identification with a safety level 4 accepted for use in Altinn's solutions. This is an identification mechanism rarely available to non-Norwegians ...

It is not proposed to have statutory rules on defined identification mechanisms or electronic certificates. The act will in this way be open to a technical development whereby Bank-ID is replaced by new mechanisms for identification, foreign ones included."

One way of solving the problems for a non-Norwegian is to use a power of attorney until international solutions are established:

"For foreign users, the power of attorney has to be sent in original paper form, while the remaining part of the registration can proceed by use of the authorized agent's Bank-ID."

There is also the possibility to use paper registration, see 4.7 below.

4.4 The registration procedure

An important element in registration is control over the requirements for registration, both regarding formalities and the material contents of the right. It is assumed that a large amount of the total documents will be subject to electronic control in both respects. If the registration is accepted by the system, the document is then automatically registered in both the journal and on the ship's page in the register, and the system will generate a confirmation of the registration. Should the document not pass the control, an automatic informal refusal of registration will be generated and returned to the sender.

In this respect the explanation in Prop. 129 L (2022–2023) p. 19 becomes important:

"Today, the Registrar spends time returning and correcting documents that are unclear or are not correctly filled in in other ways. In the electronic system, the party requiring registration will use a standardized web form that it is assumed will eliminate this problem. Furthermore, the structured form makes the documents suitable for automatic control, both as regards notification in the daily journal and for the final checking. Automatic control will reduce the length of time between notification in the daily journal and final checking to seconds or less, and the party requiring registration will immediately obtain priority for his legal right. Thereafter this party will immediately receive confirmation of registration."

13 *Prop. 129 L (2022–2023) p. 19.*

4.5 Registration effects

As said, legal protection against third parties is obtained by registration. The basic rule in MC Section 23 is not amended: time of registration (as said above) is decisive, with important qualifications in Regulation 593/1992 Section 28 for paper documents related to office hours (see 4.7 below). By contrast, electronic documents "may be delivered outside office hours" (paragraph three, as amended in 2018). In other words, electronic registration is possible at any time. The rule on priority for execution liens and arrest is not amended, nor is the rule on registration one day before declaration of bankruptcy in order to be protected.

4.6 Amendments and deletion – with qualifications regarding mortgages

Registered rights can be transferred, and legal protection for such transfer is obtained by registration. And registrations may be electronically deleted according to MC Sections 28 (deletion of ship), Section 29 (deletion of rights).

Mortgages on a vessel can be registered electronically or by use of a paper document. However, mortgages raise special issues when they are in paper form, because MC Section 24 paragraph five first sentence says:

> *"The provisions of Section 23 do not apply to the transfer of mortgages, or to the pledging of mortgage deeds governed by rules applicable to negotiable debt instruments."*

The electronic mortgage is not considered to be such an instrument:

> *"Legal protection for transfer of a negotiable instrument is connected to the actual handing over of the debt instrument … Such delivery … presupposes that the instrument is a paper document"*

Accordingly, a second sentence has been added to paragraph five:

> *"The first sentence does not apply to mortgages registered electronically."*

A registered paper based mortgage that is "a negotiable debt instrument", may, however, be deleted electronically in some instances. MC Section 29 paragraph two accepts such deletion

> *"when the holder of the right according to what has been registered, is with a Norwegian financial institution licensed to operate as a bank according to the Act on Finance Institutions Section 2-7, a bank with a branch office in Norway and its main office in another EØS-state with the right to operate as a bank in Norway according to the Act on Finance Institutions Section 5-2, or an institution named in the Act on Finance Institutions Section 1-6 paragraph one, and the bank or institution asks for deletion without presenting the original document. In such cases the bank or the institution is responsible for any loss that may occur as a consequence of the document being neither destroyed nor given endorsement of deletion from the Ship Register."*

The Ministry has remarked that it is a drawback that other foreign banks than those listed, do not have the same possibility for requiring such electronic deletion, but the benefits of the rule outweigh this – in particular in larger refinancing operations where a number of originals would otherwise have to be presented (Prop. 129 L (2022–2023) p. 24).

4.7 Paper document registration – in particular on the relationship between the two modes of registration

The fact that paper registration is still possible, and in some instances is a necessity, requires some words on the interplay between the two modes of registration. The rule that priority depends upon time of registration (MC Section 23) is further defined in Regulation 593/1992 Section 11 paragraph two:

> *"Documents are consecutively registered in the daily journal according to the date and time of reception for registration. Documents reaching the Registrar in the same mail shall be regarded as having been received at the same time. Documents arriving by morning mail shall be regarded as arriving at 10 am."*

Some examples: Two paper mortgages received after 15:00 hours on day 1 and one paper mortgage by morning mail on day 2, will all have priority from 10:00 hours on day 2. They will all have priority behind the electronic mortgage registered on day 1 at 15:01 hours or at 09:59 on day 2 (assuming that all mortgagees are "in good faith").

There is considerable flexibility in the system, see Regulation 593/1992 Section 28. The first paragraph defines office hours, which gives the background for paragraph two and three:

> *"Outside these hours, it will be possible to deliver documents for registration on all weekdays, including Saturdays and Norwegian national holidays, between 07:00 and 24:00 hours, if this is necessary for the sake of simultaneous deletion from or registration in foreign registers. The same applies when this is indicated out of regard for foreign holders of rights. Delivery of documents outside office hours must always be arranged with the Registrar.*
>
> *Electronic documents, cf. Section 7, may be delivered for registration outside office hours."*

These rules are important, e.g. when change of ownership ("closing") takes place outside Norway at a time not corresponding to Norwegian "office hours", with the involvement of a number of banks situated in more than one country.

See also the rules on system break down or upgrading in 4.2.

4.8 The shipbuilding register

As part of the NOR, there is a special register for "Ships under Construction" (BYGG), stating that

> *"Ships under construction in Norway and building contracts in Norway may upon application be entered into a separate chapter of the Ship Register (the Shipbuilding Register). Such registration also encompasses hulls, major hull sections or main engines built outside the Kingdom, in cases where delivery by the foreign shipyard has taken place" (MC Section 31).*

The applicable rules are basically the same as for sailing ships (MC Section 31 paragraph three). Consequently, the amendments of 2023 are also relevant for this register.

4.9 Bareboat registration[14]

In 2020 bareboat registration was introduced in MC in two forms:

14 More detailed on bareboat registration, see Falkanger, *Norwegian rules of 2020 on registration of bareboat charter parties*, SIMPLY 2021 (= MarIus No. 565, 2022) pp. 7–27.

I Foreign registered ships can be registered temporarily in NOR, upon request from the bareboat charterer (MC Section 40). It is not necessary here to mention the further requirements for such registration. The effects of the registration are that the ship is subject to Norwegian jurisdiction and shall fly the Norwegian flag, but that mortgages, liens or other rights in the ship cannot be registered in NOR (MC Section 40 paragraphs three and four).

II A ship on bareboat charter party registered in NOR, can be flagged-out temporarily to a foreign register upon request from the owner. In terms of the requirements for such a transaction and the effects of flag-out, we need only quote MC Section 40b paragraphs three and four:

> *"A ship bareboat registered in accordance with paragraph one has the right temporarily to fly the flag of another country and shall during this period not be considered Norwegian according to Section 1 of this Code. It does not have the right to fly the Norwegian flag and shall not have Norwegian nationality papers.*
>
> *Mortgages and lien and other rights remain registered when the ship is registered in another country's ship register in accordance with paragraph one, and new rights can still be registered in the ship register."*

The rules on bareboat registration in MC Sections 40 to 40c have not been amended in 2023, but the 2023 alterations discussed above will affect transactions concerning bareboat registration, discussed below in relation to registration of rights in the ship.

5 The International Ship Register (NIS)

The NIS Act of 1987 has no rules on ship registration, but (in particular) Section 9 empowers the King (who has delegated his authority to the Ministry) to impose rules in the form of a Regulation. Such rules on ship registration are now in Regulation 592/1992 (which has been amended a number of times).

The main rule in our context is Section 5 paragraph one, defining the Register:

> *"The Ship Register is a register for ships and rights in ships, cf. the Maritime Code Sections 13 and 20. The Register can be established electronically."*

The registration procedure and the effects of registration are, basically, in conformity with the rules for NOR, see Section 2 first sentence:

> *"The rules in the Maritime Code, hereunder the rules on registration of ships, are applicable for ships in the Norwegian International Ship Register unless otherwise stated."*

The second sentence lists a number of exceptions that are of minor interest from our perspective. We can summarise in this way: The general reference to MC 2023 entails the 2023 amendments having an effect on NIS-registration.

6 The proposal for a small boat register

On request from the Government, the Norwegian Maritime Authority has evaluated whether "an obligatory small boat register" should be established. The result of this is two reports, delivered in June 2023. The first one recommends an obligatory duty to register all ships (craft) used in trade with a length less than 15 meters, all pleasure craft with a hull length of 4.5 meters or more, and all pleasure crafts below 4.5 meters length that have an engine output exceeding 25KP/19kW. Further, a special small boat register is proposed. The second report addresses rules for such a register and its location. Co-operation with the existing ship registers is recommended. A special "Act on Registration of Ships/Craft used in Trade or for Pleasure with Length less than 15 Meters" is proposed, with commentaries relating to the 20 sections contained in the draft.

For the sake of simplicity, the word 'boat' is used in the following.

We shall here limit ourselves to some words on the relationship to registration in NOR. The proposed small boat register does not have as its purpose the registration of rights. First of all, it shall serve public interests:

> *"The register shall give better information on ownership to small boats and on the boat itself, so that one can more easily clarify escape actions, prevent criminality, take care of the environment and climate interests etc."*
>
> Section 4 has rules on the duty of registration:
>
> *"The following boats to be used in Norwegian territorial waters, river or lake and having permanent connection to Norway shall be registered in a national register:*
>
> a) *boats used in trade*
> b) *pleasure boats with hull length of 4.5 meters or more*
> c) *pleasure boats with engine output over 25hp/19kW.*
>
> *Pleasure boats that are not required to register, may be registered if they are used in Norwegian territorial waters, river or lake and have permanent connection to Norway.*
>
> *The duty to register does not apply to boats that are registered in the Norwegian Ordinary Ship Register. The Ministry can give supplementary rules on the duty to register in the regulated form."*

Thus, the rules in MC on registration are not affected if the small boat register proposal is made law. The boat owner will be relieved to some extent of his duty to register in the small boat register, see the proposed Section 4 paragraph three on exemption, if already registered in NOR, but the owner is not prevented from having his boat in both registers.

Wars and Laws: how war has influenced the development of the law of marine insurance

Talk given at conference organised by Wikborg Rein and the Scandinavian Institute of Maritime Law, Oslo
13 March 2024

Sir Richard Aikens

Sir Richard John Pearson Aikens, Brick Court Chambers, London – former Lord Justice of Appeal (2008–2015), currently international arbitrator and Visiting Professor at King's College London and Queen Mary University of London.

It is an honour to be invited to talk to you this evening. The talk is a modfied version of a lecture I gave in London late last year: the fifth Jonathan Hirst Memorial Lecture. The series had been set up by the chambers where I had worked as a barrister before becoming a judge, in honour of Jonathan, who had been head of chambers but had died young. Much of his practice involved marine insurance, so it seemed appropriate to speak on that topic.

The idea for the title came from the "Arbitration Award" of Sir Christopher Staughton in *The Bamburi.* [1982] 1 Lloyd's Rep 312. (At the time Sir Christopher was a high court judge, but under the Arbitration Acts high court judges could be appointed to sit as "judicial arbitrators"; except the fee went to the government, not the arbitrator!). *The Bamburi* was a test case between a large number of Lloyd's underwriters and the owners of *The Bamburi* and about 70 other ships. The cases arose out the detention of many ships in the Persian Gulf in the course of the Iran-Iraq war, which had started in 1980. Although Sir Christopher was appointed as a judicial arbitrator to try these test cases in private, the Award was published. In the Award he said: (page 313):

> "The political and commercial history of the Western world for the last two hundred years is reflected in the cases on war risks insurance".

In my view, Sir Christopher was being too cautious in confining the influence of war to "war risks insurance". War influenced the development of all insurance, but particularly all aspects of marine insurance. This is particularly true of the English law of marine insurance. To cover the subject comprehensively would need a book. Indeed in 2021 Professor Robert Merkin published two large volumes entitled "*Marine Insurance: a legal history"*, which I have looked at but deliberately not consulted in detail. My aim is different. It is to take a number of marine insurance topics and particular cases and place them in their historical context, in order to show how wars have influenced the development of the law. The concepts are all fundamental to the English law of marine insurance. I have chosen five.

First, the doctrine that a contract of marine insurance is one of "utmost good faith"; secondly, the requirement that a person who insures a ship or cargo (or freight) must have an "insurable interest" in the thing insured; thirdly, the development of the concept of a "constructive total loss" of an insured thing – be it ship, cargo or freight; fourthly, the division of insurance risks into what have become known as "marine risks" and "war risks"; and, lastly, the development of the doctrine of "causation" in marine insurance.

First, though, a lightening journey through early marine insurance. There is a poem by the English 20th century poet John Masefield called "Cargoes". The first verse is about the cargoes onboard a "Quinquireme of Nineveh from distant Ophir". It is said someone once joked that the cargoes were probably insured by Phonecian merchants. More recently, insurance law was moulded by the Rhodians and is found in the codes of the Ile d'Oleron. Modern marine insurance was developed by the Genoese and was found in England from at least the 16th century. A statute of 1601 created a court to deal with marine insurance cases. (43 Eliz c.12). The Act referred to "the usage of the merchants both of this realm and of foreign nations, when they make any great adventure, to give some consideration of money to other persons to have from them assurance made of their goods, merchandise, ships and things adventured, which course of dealing is commonly called a policy of assurance". A standard form of policy, which became the "SG Policy" (short for Ship and Goods Policy) was in use in England from the end of the 15th century. The notoriously convoluted wording was formalised in 1779 and remained in use, virtually unchanged, until finally discarded in the 1980s. But many of the cases that are still relevant today relate to terms in the SG Policy wording.

The English law of marine insurance was also influenced by continental treatise writers. The works of the French jurists Valin, Pothier and Emerigon were very influential on 18th century English judges, particularly Sir William Murray, Lord Mansfield, Chief Justice of the King's Bench from 1756–1788. That period covered the Seven Years War – 1756–63 – and the War of American Independence: 1776 to 1783. Lord Mansfield decided many marine insurance cases. But to start I want to examine *Carter v Boehm* (1766) 3 Burr 1905 (97 ER 1162): one of the most important cases in marine insurance law.

The event giving rise to the case took place in the Seven Years War, which was fought out in Europe, America, India and in the Dutch East Indies, now Indonesia. It is famous (in British eyes at least) for General Wolfe's victory at Quebec, the British-Hanoverian victory at Minden, Admiral Hawke's defeat of the French navy at Quiberon Bay and the British victory at the battle of Plassey, where Robert Clive led troops of the British East India company. It was, as Winston Churchill once remarked, the first "world war".

However, it was not all victories for the British. In Sumatra the main British East India Company settlement was Bencoolen (now called Benkulu). It was defended by the inaptly – named "Fort Marlborough". This was more of a "factory or settlement", not a military fort to defend attacks by a European enemy.

A policy of insurance was taken out in 1760 for one year, (backdated to 1759) against the loss of the fort from an attack by a foreign enemy. The policy was for the benefit of the Governor of the Fort, George Carter, through the agency of his brother. Mr Boehm was a Lloyd's underwriter. On 1st April 1760 the "fort" was attacked by a French man of war of 64 guns and a frigate of 20 guns. These forces of the French East India Company were under the command of Count D'Estaigne. They had "the connivance of the Dutch", as Lord Mansfield put it in his judgment. The fort was taken, given over to the Dutch and the prisoners were taken to Batavia, now Djakarta.

The Governor, Mr Carter, brought a claim on the insurance for the loss of goods totalling some £50,000. (You can probably multiply that sum by 100 to get present day values). The underwriter pleaded in defence that there had been a "fraud", by concealment of circumstances which ought to have been disclosed: in particular, the weakness of the fort and the probability of it being attacked by the French. The response was that these facts were "universally known to every merchant upon the exchange in London". At the trial the special jury of merchants of the City of London found for the claimant, but the defendant sought a new trial on the issue of law of whether there had been a concealment by the insured of relevant facts, with the result that it vitiated the policy.

In his famous judgment Lord Mansfield made his ruling on the duty of an insured to disclose all material facts which he knows: "good faith forbids either party by concealing what he privately knows to draw the other into a bargain, from his ignorance of that fact and his believing the contrary". The reason for this was "to encourage good faith". But the insured may be "innocently silent" of things which the underwriter knew or ought to know. Lord Mansfield said that this "governing principle" of good faith applied to all contracts. In doing so, as his biographer CJS Fifoot put it, Lord Mansfield "strained the digestion of the common law". In the 21st century (under the care particularly of a judge who is now in the Supreme Court, Lord Leggatt) the digestion of English contract law to this particular concept has become more robust, or more accommodating, depending on how you want to look at it.

On the facts of the case, Lord Mansfield concluded that there had been no concealment; that the underwriters either did or should have known of the condition of the "fort"; and that when the policy was taken out there was no knowledge of a likely attack by the French.

Many cases on the duty of "utmost good faith" followed *Carter v Boehm.* The principle was codified in the Marine Insurance Act 1906 in sections 17, 18 and

19. The first of those sections has been modified and the latter two sections were repealed and replaced by a duty of "fair presentation" by the insured, in the Insurance Act 2015. That expression reflects the phrase used by Lord Mansfield himself in *Carter v Boehm* when he said "the question therefore must always be whether there was, under all the circumstances at the time the policy was underwritten, a fair presentation…". Since the 2015 Act there has been a debate as to the extent of the post contract duty of "utmost good faith". But there can be no doubt that war led to the case that has been the foundation of modern marine insurance law on this fundamental duty.

Next: "insurable interest". In the late 17th and early 18th century, when the marine insurance industry was growing in London, there was no settled principle that a person who took out an insurance on a ship or cargo, or the "maritime adventure", had to have some kind of *legal interest* in the thing insured; in other words, that he had to have "an insurable interest". Effectively, a person could bet on whether the ship or the cargo would be lost on the voyage. These "bets" were known as 'gaming policies' and they were perfectly legal and were enforced by the courts. The standard wording in those days was "of interest or no interest, without benefit of salvage" – as was the case in the policy in *Carter v Boehm.* Later the wording was often changed to "policy proof of interest" or "PPI". Gaming policies became notorious and underwriters lost much money on them. So they were made illegal, but with regard to British ships and cargo only, by the Marine Insurance Act 1745. From then on the issue of whether an insured was wagering or had some legal interest in the subject matter of the insurance became of crucial importance. But the ambit of the doctrine was uncertain.

We now come to the "Revolutionary" and "Napoleonic": wars. These were the last of a series of wars between France and England/Britain between 1689 and 1815 – another "One Hundred Years' War" effectively. In all those wars, The British tried to keep involvement "on the continent" to a minimum; often subsidising allies to provide the land armies. The British relied on the Royal Navy, not always with complete success, for example in the War of American Independence. The British system included blockading French ports and those of its allies and the Royal Navy and privateers captured French and allied cargo ships.

These cargo ships were then taken either to Britain or to some port in a British colony where the captors would hope to have the ship and cargo condemned as "Prize". The Prize Court had been established in the 17th century as part of the High Court of Admiralty. There were Vice-Admiralty Courts of Prize in British colonies such as in Jamaica. (That Court alone condemned prizes worth £2,300,000 during the Revolutionary war).

Prize money was, to use the phrase of the distinguished Naval Historian, NAM Rodger, the "traditional balm to the wounded naval spirit". Admirals and Captains could become rich on prize if they were on the right station during the Napoleonic War. But there were also legal dangers in capturing a ship for prize. If the captured ship turned out to be a neutral ship the Prize court could award damages, which the Captain of the capturing ship had to pay. "Law is a bottomless pit and I have no inclination to fathom its depths" as one Royal Naval Commodore put it when refusing to consider taking a Danish ship as prize.

Taking the captured ship back to Britain, or to another Prize Court, in order to be adjudged Prize involved the usual maritime risks as well as the risk of recapture by the enemy. For example, after the Battle of Trafalgar, where several ships of the French and Spanish fleet had been captured, there was a huge storm and a large number of the potential prizes were lost. So, obviously, one way to deal with this possibility of loss *en passage* was to insure the ships and their cargoes.

The case of *Lucena v Craufurd* (1806) 2 Bos & Pul (NR) 269 concerned eight Dutch ships which had been captured on 10 June 1795 by HMS *Sceptre,* commanded by Captain Essington, in company with some East India Company men of war. At the time the United Provinces (now the Netherlands) were a reluctant ally of France.

A British Order in Council authorised the capture of Dutch ships and cargo and set up a board of Commissioners whose task was to bring them to Britain and then sell them once they had been condemned as Prize. The chief Commissioner was Mr James Craufurd. Royal Navy ships ("carrying Letters of Marque" authorising them to seize enemy ships) were under instructions from the Admiralty to take all ships and cargoes belonging to subjects of the United Provinces and to bring them to Britain. The eight Dutch ships were captured off the Cape of Good Hope and (coincidentally) taken to Saint Helena in the South Atlantic. A policy of marine insurance against the loss of the captured ships, underwritten by Mr Lucena, was issued in favour of Mr Craufurd and the other Commissioners. On the voyage from Saint Helena to Britain four ships were lost. The Commissioners claimed on the policy, arguing that the ships and cargoes had been lost by an insured peril: "perils of the seas". The defence was that the Commissioners had no legal interest in the ships at the time they were lost.

The case was argued in the Court of Exchequer and and the Court of Exchequer Chamber, where the claimants won on the point. The case then went to the House of Lords, where, under the custom of the time, ten judges of the Court of Exchequer Chamber and the Court of Common Pleas were summoned to give their opinion on eight questions of law put to them by the Lord Chancellor, Lord Eldon. Question five asked if the claimants had an interest in the ships and cargoes "so that a legal and valid assurance could be affected on the said goods and on the bodies of the said ships". On that question the judges were divided. The majority said yes; but two judges, Chambre J and Lawrence J, said no. The judgment of Lawrence J has since been accepted as being the best analysis of the concept of an insurable interest. (The great writer of the standard English law textbook on Marine Insurance, Joseph Arnould, described Lawrence J as "that learned master of maritime law"). Effectively the judgement of Lawrence J was adopted by Lord Eldon (who had by then become a former Lord Chancellor), Lord Ellenborough, Chief Justice of the King's Bench and Lord Erskine (the new Lord Chancellor, who, incidentally, had argued the case for the claimants in the Exchequer Chamber and even in the House of Lords). However, at a retrial, it was held that the Commissioners could claim on the insurance on behalf of the King, who, it was held, had an interest in the ships and cargo at the time of their loss.

In the Napoleonic wars British trade had actually expanded by 60% and its merchant marine had grown from 1.4 to 1.8 million tons. The City of London had received money, seeking security, from embattled continental financial centres such as Amsterdam and Frankfurt. The English marine insurance industry boomed. British administrations were anxious always to increase trade and find new markets – *plus ca change* – and a particular area was that of the River Plate, where trade had been growing since the 1780s. In 1804 Spain had allied herself with France. The success of the Royal Navy at the Battle of Trafalgar and a successful invasion of the Cape of Good Hope turned eyes to South America. An unofficial expedition of Royal Navy ships under Commodore Sir Home Popham, was mounted, with the aim of conquering the Vice-Royalty of Buenos Aires in the tottering Spanish Empire.

This attempted invasion of what is now Argentia and Uraguay failed dismally. Popham was court-marshalled, but the government of Lord Grenville (the soi-disant "ministry of All the Talents", which had at least abolished the slave trade in the British Empire in 1807) decided nevertheless to send reinforcements. The Grenville government did not last long; but the next administration was equally ambitious. It wanted to open up the South American markets to British manufacturers and take over the Peruvian gold and silver mines. In this second attempted invasion the naval squadron was commanded by Admiral Sir Charles Stirling. Again, it was ultimately unsuccessful and the commander, Lieut – General Sir John Whitelocke was court-marshalled and cashiered.

In the course of an attack on Montevideo in this second expedition, a ship called "*Prize No 3*", along with other vessels, was captured from the Spaniards by the conjoined forces of the British Army and the Royal Navy. She and her cargo were insured by a "prize agent" on behalf of Sir Walter Stirling and other "captors". She was lost by perils of the seas on her homeward voyage to Britain and the "captors" claimed on the insurance. There were two issues: whether the "prize agent" had acted on behalf of the captors, the Army and Navy; and whether they had an insurable interest *before* the condemnation of the vessels as Prize; or, alternatively, did the King have an interest, in which case it was said that there was no evidence that the agent had acted on his behalf.

The Court of King's Bench, on an application for a new trial on the legal issue, concluded that the captors had an insurable interest because they had actual possession of the vessel after its capture. The important point of law made by Lord Ellenborough was that a person who has a defeasible interest in goods. (that is one that may subsequently be lost, legally speaking), may have a good insurable interest. The situation was like a consignee of goods, whose interest may be defeated by loss or stoppage of the goods in transit for non-payment of the price. The interest in the goods was more than a "mere expectation".

The law on insurable interest, as expounded in these case, has been codified in the Marine Insurance Act 1906 section 5. There has been argument at the margins of the doctrine, but the principles in the early cases have stood firm. Suggestions by the Law Commission in a report in 2012 that the law on insurable interest should be amended or that the doctrine should be abolished, have not been met with enthusiasm from either the market or the lawyers.

Next: the doctrine of constructive total loss of insured property. This is a doctrine that is exclusive to marine insurance. It does not exist in other forms of insurance, such as non-marine, or aviation insurance, although something like it has been evolved through the cases, particularly in relation to aviation insurance. The concept of a "constructive total loss" or, as practitioners call it "CTL", is in the legal news at present, because of the war in Ukraine and the effect it is having on ships and aircraft that have been detained because of the war. The CTL concept is simple: an insured can claim as for the total loss of the subject-matter insured even when it is not completely lost by an insured peril, eg such as when sunk, or blown up, provided the insured can show that the insured object's ultimate loss appears to be unavoidable or its loss could not be avoided without an expenditure that would be more than the object's value after the expenditure has been incurred.

If an insured wishes to claim for a constructive total loss then he has to give a "notice of abandonment" of the insured property to the insurer. This notice means what it says; the insured is declaring that it abandons all its legal interest in the property insured to the underwriter/insurer; and in return it claims on the insurance policy for the loss.

In practice insurers never accept a notice of abandonment ("NOA"), because if they do so it is an acceptance that a loss has occurred and, unless there are other defences, they have to pay out on the loss under the policy. Instead, the practice has been to agree to put the insured in the same position as if proceedings had been started. In the old days the insurance "slip" – the scrappy bit of paper on which the insurance was written by the underwriters at Lloyd's – was marked (or "scratched") "writ issued". To succeed, the insured has to prove that, at the time of the NOA and its rejection by underwriters, the insured was, in fact, deprived of possession of the ship, or cargo, and it was unlikely that it would recover it; or that the cost of recovering it would be more than its worth once recovered.

The doctrine of the constructive total loss developed from cases where ships and cargo had been captured by enemy forces in time of war. The SG policy wording included amongst the perils insured those of "men of war, enemies, pirates, rovers" and "arrests, restraints and detainment of all kings, princes and people

of what nation, condition of quality soever…" Characteristically, a ship would be captured by an enemy warship or privateer, then recaptured by British forces. At some stage the insured might attempt to "abandon" the ship to the underwriter. The issue for the court was whether there had been a constructive total loss (in the sense I have described) at the time of the abandonment to the underwriter.

Two early cases, both decided by Lord Mansfield, demonstrate the difficulties. First, *Goss v Withers* (1758) 2 Burr 683. This was therefore during the Seven Years War. There were two policies, one on the hull of the *David and Rebeccah* and the other on her cargo of fish. The voyage was from Newfoundland to a port of discharge in Portugal or Spain. The vessel was badly damaged in a storm and a quarter of the cargo was jettisoned. She was then captured by the French on 23 December 1756 and her master and crew taken off and carried to France. The ship remained in French hands for 8 days, then was retaken by a British privateer. The ship and remaining cargo were taken to Milford Haven but, not surprisingly, the cargo was by then rotten. On 18 January 1757 the insured offered to abandon the ship and cargo but that offer was rejected. The issues of law were (1) whether the capture created a "loss" and (2) whether the insured had the right to abandon the ship and cargo to the insurers. "Yes" said Lord Mansfield. At the time the ship and cargo were abandoned to the insurer, there had been a loss by capture; the subsequent recapture did not restore the property as it had been before the loss to the insured. Salvage had to be paid, the voyage had to be abandoned; the charterparty was dissolved; the freight was lost; the ship and cargo had to be brought into an English port (not to Spain or Portugal as contemplated) and the cargo was rotten. Therefore the insured had the right to abandon once the ship was brought into Milford Haven and could recover for a total loss.

Secondly: *Hamilton v Mendes* (1761) 2 Burr 1199. There the *Selby* and her cargo of tobacco were insured for a voyage from Virginia to London. On 6 May 1760, (so in the middle of the Seven Years War), she was taken by a French privateer *Aurora,* hailing from Bayonne. The English crew of *Selby* were taken off and she was sailed to Bayonne. Near the port the vessel was retaken by a Royal Navy ship, the *Southampton,* under the command of Captain Antrobus, who took her to Plymouth on 6th June. The owner sent notice of abandonment on 23 June 1760. It was rejected although the insurer offered to pay the costs of salvage (which had had to be paid to the Royal Navy ship) and any other expenses. The ship had suffered no damage and the cargo was safely delivered later in London.

The claim for a total loss failed. Lord Mansfield stated that the right to claim for a total loss in a case like that depended on the true situation when the notice of abandonment was given. And if at that time (in this case after the vessel had got to Plymouth) "the advice shows the peril to be over, and the thing in safety, [the insured] cannot elect [to abandon] at all, because he has no right to abandon when the thing is safe" (1212). He distinguished *Goss v Withers* where, he said, that at the time of abandonment the whole ship and cargo were "literally lost"; cargo had been jettisoned and "the voyage entirely lost"; the cargo of fish had perished by the time it got to Milford Haven and the "ship shattered".

The rule that in determining whether there had been a total loss at the time of abandonment the "ultimate state of facts" had to be considered, rather than what was thought to be the case at the time, was firmly established by *Naylor v Taylor* (1829) 9 B & Cr 724. That was a case of capture in the River Plate of a ship called *Monarch* by a Brazilian warship. The Emperor of Brazil had declared a blockade of the ports of the "government of Buenos Aires" and the ship was thought to be running the blockade. Lord Tenterden CJ gave the judgment of the court and confirmed the rule that the ultimate state of facts had to be considered. It remains the law.

Two particular problems about deciding when there was a CTL remained. First, what was the degree of deprivation that was needed; secondly how long did the

insured have to be deprived of possession of the insured subject matter before it could be said that he was unlikely to recover it.

On the first of these issues there was an important case which arose out of the siege of Paris in 1870 by the Prussian army in the course of the Franco-Prussian War. You will recall that this war was engineered by the Prussian Chancellor, Count Bismark and the Emperor Napoleon III of France fell into Bismark's trap. Although the French mobilised first and made some advances, the Prussian armies had a decisive victory at Sedan and Napoleon III abdicated. Leon Gambetta led the new provisional republican government, but the Prussian armies advanced to Paris, where they laid siege on 20 September 1870. The siege lasted till the armistice was declared on 26 January 1871. France then suffered the indignity of having to cede much of Alsace – Lorraine to Prussia and had to pay huge reparations. To cap it all, the new German Empire was proclaimed in the Versailles palace.

Meanwhile the facts of *Rodoconachi v Elliott* (1874) LR CP 518 took place. A consignment of silks from Shanghai to London had been insured at Lloyd's against, among other perils "…arrests, restraints, and detainments of all kings, princes and people &c". The silks were sent by ship to Marseille and then transported by train to Paris, arriving there on 18 September 1870. The intention had been to send the silks by rail on the "northern railway" from Paris to Boulogne and then ship them to Dover and transport them by train to London. But by 18 September 1870 the Prussian army had seized the "northern railway" and then the siege of Paris began on 20 September. Although the silks were not touched or damaged, it was impossible to move them from Paris. The assured gave notice of abandonment to underwriters on 7 October 1870, claiming a CTL of the goods. The principal issue before the Court of Exchequer Chamber was whether the fact that the goods could not move from Paris meant that the insured was deprived of possession of the goods by reason of "restraint of kings or princes". Yes, said Baron Bramwell, a distinguished commercial judge. He said (page 522): "what we have to look at is whether, by the immediate and direct pressure of the German army, the goods were prevented from reaching their destination. A siege like the present, which was intended to reduce the besieged place by famine, is a prohibition of all commerce and intercourse in the besieged place". The fact that the goods themselves were not directly impeded was not to the point. So, having referred to a decision of the US Supreme Court, Grotius and the celebrated English Admiralty judge Lord Stowell, the learned Baron concluded that "the effect of the siege of Paris was to cut off entirely all foreign connection and correspondence [so that] the goods in this case were restrained or prevented from leaving Paris by the operation of that siege" and that was within the insured peril of restraint of princes.

The principle established in that case that there could be a constructive total loss of goods where they themselves were unharmed but could not be delivered because the marine adventure had been frustrated by reason of war or some other restraint remained after the Marine Insurance Act 1906 was passed. It was confirmed by the House of Lords in *British and Foreign Marine Insurance Company Ltd v Samuel Sanday* [1916] 1 AC 650. There British ships were carrying cargo from South America intended for Hamburg. The cargo was insured in London. The first world war was declared whilst the ships were on their voyage and they diverted to British ports at the suggestion of the Admiralty. The cargo owners sued for CTLs, arguing that the frustration of the voyage entitled them to claim. The House of Lords held that was correct. But the decision caused surprise in the marine insurance market because they considered that this conclusion meant insurers were liable for risks that were more of a political nature, rather than those of violence. The result was the creation of a standard clause in marine policies, the "Frustration Clause". This was in the form of a "warranty", that is a promise by the insured that something would not occur: "warranted free from any claim based upon loss of or frustration of the insured voyage or adventure caused by arrests, restraints or detainments of Kings, Princes, Peoples etc". But the scope of the

Frustration Clause was limited by the House of Lord's decision in *Rickards v Forestal Land, Timber & Railways Co* [1942] AC 50, another case arising out of the capture of goods during a voyage, but during the second World war.

The question of the degree of deprivation of possession needed to amount to a CTL remained in issue for more than a century. It is considered at length by Sir Christopher Staughton in *The Bamburi.* There the vessel had been detained, but officers and crew could get on board. The judge decided that the test was whether the insured had "the free use and disposal" of the vessel, which phrase is now used in the standard "Detainment clause" in marine policies, which I mention again in a minute.

The issue of deprivation of possession arose again in a case I argued as counsel: *Royal Boskalis Westminster NV v Mountain* [1997] LRLR 523. This arose out of Saddam Hussein's invasion of Kuwait in 1990. The insured's dredgers were working in the Shatt al Arab and they and their crews were detained after the invason. The insured gave a notice of abandonment of the vessels, claiming a CTL. Subequently the insured obtained the release of the crews and dredgers by paying (secretly) a large ransom to the Iraqi government, in breach of UN sanctions. The insureds claimed, as an alternative to a CTL, that the ransom payment was a 'sue and labour' expense. Many issues arose in the case, which was probably the most interesting case that I did at the Bar. But on the issue of whether there had been a CTL by reason of loss of the "free use and disposal" of the vessels, Rix J held, on the facts, that they had not, largely because the dredgers were still able to do their work in the Shatt.

The other problem which remained after *Rodoconachi* was the question of how long the detention had to be. Eventually, the issue was solved by having a standard clause in what became the "War and Strikes Clauses", which clause was called the Institute Detainment clause from 1983 onwards. (It had been in use as an additional clause before then). The Detainment clause states that if the vessel has been the subject of capture etc and the insured had lost "the free use and disposal" of the vessel for a continuous period, usually 12 months, that is sufficient to constitute a CTL. The problem in the *Royal Boskalis* case was that the detention had not been for that long. This led to interesting expert evidence on the state of mind of Saddam Hussein concerning his intentions in Kuwait and in relation to detained vessels and aircraft at the time that the notice of abandonment was given and rejected by underwriters.

So to the next topic: how war or the threat of it led to the separation of "marine risks" from "war risks" in marine insurance policies and subsequently to the development of two sets of standard terms, known now as the "Institute Clauses". As we have seen, the old SG Policy wording had stated that the "perils" that were insured against included: "of the seas, men of war, fire, enemies, pirates, rover, thieves, jettison, letters of mart and countermart, surprisals, takings at sea, arrests restraint and detainments of all kings, princes and people….barratry….". The total list, with fifteen specific perils, was a comprehensive cover against most kinds of damage that were thought likely to occur to a ship or cargo on the high seas. Of the fifteen identified perils, eleven related to some sort of violence on the high seas. As Joseph Arnould put it in his text book on marine insurance: "protection against human malice..was regarded by shipowners and merchants as the most important part of their insurance cover". (Arnould 16th ed para 880).

Given the high risk of loss by a "war peril" in the 18th century, underwriters sometimes inserted a clause in policies which excluded cover against war risks. This was in the form of a "warranty", that is to say a contractual promise by the insured, that the vessel or cargo would be "free of capture and seizure". It became known as the "f.c and s clause" and, indeed, that term is still widely used. An early example is in 1739 in a policy on the hull of "*Charming Peggy*" for a voyage from North Carolina to London. This voyage took place during the so – called War of Jenkin's Ear between Spain and Britain, which lasted from 1739 to 1748

and took place mostly in the Carribean. (In fact the ear of Captain Jenkins of the British brig *Rebecca* had been cut off by Spanish coast guards in 1731). British ships trading from America were in danger of being seized by Spanish naval vessels; hence the exclusion. The evidence was that "*Charming Peggy*" had set sail but never been heard of since. The underwriters argued that because there was an exception in the policy it was up to the insured to prove that the loss occurred in the manner alleged- ie. that she had sank at sea. Interestingly there was evidence from witnesses in the trade that if a vessel goes missing the presumption is that she has foundered at sea. That presumption is now enshrined in s.58 of the Marine Insurance Act 1906. The issue of the cause of the loss was left to the jury who found for the claimant.

Although the f.c & s clause existed, it was not much used after 1815. In the ensuing period, as the historian of Lloyd's, DEW Gibb states (220) "Neither the strength of our national forces nor the capacity of underwriters had been tested by experience". However, the attitude of Lloyd's underwriters and insurance companies in London to war risks changed dramatically in the last 20 years of the nineteenth century, for two allied reasons. The first was the invention of the torpedo in 1862 and, subsequently, the launch of the first submarine by the French Navy in 1893. This new threat to shipping by torpedoes launched from underwater was dramatized in a short story by Sir Arthur Conan Doyle, which imagined a single French submarine stationed off the mouth of the Thames torpedoing British merchantmen as they entered or left the estuary.

The second reason was Anglo-French rivalry, particularly in Africa. This grew strongly once France had picked herself up after her defeat in the Franco-Prussian War in 1871. Whilst Britain had looked more to the East Coast of Africa, (Kenya, Uganda), France concentrated on North Africa (she had annexed Algeria in 1834) and in West Africa. In 1883 British forces then bombarded Alexandria in order to quell the "Urabi Revolt" against the Egyptian Khedivate. The revolt threatened the joint Anglo-French control over Egyptian finances and their joint control of the Suez canal. The British effectively took over management of the Egyptian government and the de facto governor was Evelyn Baring, Earl of Cromer, who recommended that the British occupation continue; as it did.

These moves alarmed the French who wished to prevent a British control of Eastern Africa from "Cape to Cairo". Thus the French expanded into what Lord Salisbury (the British Prime Minister for much of the 1890s) euphemistically called "the light soil areas" of Africa. Tension between the two powers was high throughout the 1880s, but reached new levels from 1895. Colonel Jean Baptiste Marchand, who had been posted in the French army to what is now Mali in 1885, hatched a project with the Ministry of Colonies in Paris to lead an expedition across Africa to a settlement on the White Nile, with a possible intention of daming it. The *Asssemblé Nationale* agreed to finance the plan and in 1897 Marchand set off with a band of 150 men, including porters. This in turn alarmed the British, who started a two pronged movement to foil the French plan. General Kitchener was instructed to move south from Egypt into the Sudan, where he had to fight the local leaders to make progress. At the same time there was an attempt to build a railway north from Nairobi through Uganda into southern Sudan. Marchand reached the settlement of Fashoda on the White Nile in July 1898 and raised the French flag. After the battle of Omdurman in September 1898 Kitchener and his flotilla of gun boat forces also reached Fashoda. Ultimately, after a stand off and with both countries' navies at readiness for war, the French foreign minister Declassé ordered Marchand to abandon Fashoda. In France he mutated from "*l'héro de* Fashoda" to "*le martyr*" de Fashoda. But war had been avoided – just.

This threat of war made underwriters at Lloyds and in the companies market very nervous. In 1896 the London Assurance company wrote to the committee of Lloyds suggesting that there be a rule that a clause excluding war risks should be inserted in standard marine policies of both Lloyds and companies. That was

rejected. Yet the tension caused by Marchand's expedition resulted in a reversal of policy. The Committee called a general meeting of underwriting members on 15 June 1898 to consider a resolution that in future all risks of war should be excluded from ALL Lloyd's marine policies unless a special agreement should be reached that they be covered. The resolution was passed. As DEW Gibb put it, the resolution was "a decree of divorce between war and marine" risks and "the twain have not been one flesh" since then.

The following year a further resolution was passed to the same effect. The different nature of marine risks and war risks was therefore recognised, and, in the London markets at least, they had thenceforth to be separately insured. However, the result was what Arnould described (16th ed para 880) as a "convoluted method of insuring against war risks" which continued until the new Marine policy terms and Institute Clauses for marine and war risks were introduced in 1983. The simple course would have been to have a separate war risks policy that covered the risks that were excluded by the f.c & s clause. Instead, the war risks insurance covered "the risks excluded from the standard form of English marine policy by the f.c & s clause". So, in order to recover in respect of a loss from one of the war risks, there were two questions to be answered: (1) was the loss caused by one of the perils covered by the ordinary marine policy wording; and (2) if so, was it then excluded by the f.c & s exception. (Arnould 880).

This "convoluted method" leads to the last topic I want to touch upon, namely causation. There is one particular case, arising from a wartime casualty, that has been very influential in the law of causation in relation to marine insurance and the law of causation generally. It is *Leyland Shipping Company v Norwich Union Fire Insurance Society* [1918] AC 350. When war against Germany was declared in August 1914, the Royal Navy immediately put into operation a blockade of all German shipping, following the example of the blockade in the Napoleonic wars. It was ultimately successful, (by 1918 Germany was near starvation), but in early 1915 the German Navy retaliated. It declared that the area around the British Isles was a war zone in which all merchant ships, including those from neutral countries, would be attacked by the German High Seas Fleet. The German Navy enlarged its submarine fleet and used it with increasing effect, up until the torpedoing of the British passenger line *Lusitania* on 7 May 1915. She was carrying 128 US citizens who were amongst the 1215 passengers who lost their lives. President Woodrow Wilson protested strongly to the German government. The German Navy suspended U-boat operations altogether from September 1915 until February 1917.

In January 1915 *Ikaria* was on a voyage from South America to Le Havre and London and was insured for marine risks including perils of the seas, but the policy contained an f.c & s clause in a form then current: 'warranted free of capture seizure and detention and the consequences thereof …and also from all consequences of hostilities or warlike operations whether before or after the declaration of war". On 30 January 1915 the vessel approached Le Havre and stopped to take on a pilot, some 25 miles NW of the port. She was struck by a torpedo fired by a German U-boat and hit abreast the No 1 hatch, making two large holes in the vessel and filling the No 1 hold with water. The crew left in a tug because it was feared *Ikeria* might sink. But she kept afloat and she was taken to the Quai d'Escale in Le Havre. The courts found, as a fact, that had she been able to stay there she would have been saved. However, a gale sprang up and the vessel ranged and bumped against the quay. The port authorities feared she might sink and block the quay, which was being used to land military supplies. Therefore they ordered her away and she went to anchor at the outer harbour. There she took the ground at every low tide as her bow was down so much because of the water in the No 1 hold. The bulkhead between the No 1 and No 2 hold gave way and the vessel became a total loss on 2 February 1915.

The issue before the courts was whether, as the claimant argued, the loss was by "perils of the seas", that is as a result of the damage suffered at the outer harbour

where she sank; or was a loss by "hostilities", viz the torpedo. The test, laid down in s.55 of the Marine Insurance Act 1906 was (and is) that an insurer is liable for losses "proximately caused by a peril insured against". Before this case it was common to ascribe the last cause of the loss as being the proximate cause. That approach was rejected in the *Leyland Shipping case.* Rowlatt J and the Court of Appeal had held that the loss was proximately caused by the torpedo, so the insurers were able to rely on the f.c & s exclusion. The House of Lords agreed. Lord Shaw of Dunfirmline gave the speech that analysed the issue of causation best. He cautioned against too much theorising. He rejected the notion that causation is a "chain" and thought it more like a net. The "proximate" cause was the "efficient" cause. In this case that cause was the torpedo.

Leyland Shipping remains the leading case on what is meant by "proximate cause", in the context of marine insurance, although its application when there are two or more causes that are concurrent has caused difficulties. Judges have resorted to an appeal to "commonsense standards" to decide amongst competing causes, see eg. the speech of Lord Wright in *Yorkshire Dale Steamship co Ltd v Minister of War Transport* [1942] AC 691, at 706; another case on whether the loss was a war risk or a marine risk. Lord Hoffmann, in an interesting article on causation in the Law Quarterly Review in 2005 said (adopting a remark of Lord Keynes about economic theories adopted by those in authority) that if "you are looking for the intellectual influences on the older judicial members of the House of Lords, the best way is to ask what was new and exciting in legal philosophy 50 years ago". That was, he thought, not a sure guide. In the end, Lord Hoffmann said, a judge "has to decide, as a matter of law, what causal connections the law requires and then decide, as a question of fact, whether the claimant has satisfied the requirements of the law". That, I think, is precisely what was done by the judges in *Leyland Shipping.* And it was done by the Supreme Court most recently in *Financial Conduct Authority v Arch Insurance* [2021] AC 649 dealing with causation in the case of business interruption insurance cover and losses caused by Covid.

That is all there is time for! Wars have certainly caused laws as well as laws sometimes causing wars. I don't suppose it will be any different in the future.

Thank you.

Wars and Laws: how war has influenced the development of the law of marine insurance – the Norwegian/Nordic perspective

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Content

1 Introduction

This article is a commentary from a Nordic perspective on Sir Richard Aikens' lecture entitled "Wars and Laws: how war has influenced the development of the law of marine insurance".[1]

Sir Richard Aikens addresses several topics fundamental to marine insurance in his lecture:

> "First, the doctrine that a contract of marine insurance is one of "utmost good faith"; secondly, the requirement that a person who insures ship or cargo (or freight) must have an "insurable interest" in the thing insured; thirdly, the development of the concept of a "constructive total loss" of an insured thing – be it ship, cargo or freight; fourthly, the division of insurance risks into what have become "marine risks" and "war risks"; and, lastly, the development of the doctrine of "causation" in marine insurance."

All of these topics are also highly relevant to Norwegian and Nordic marine insurance, and indeed for land based insurance as well. However, they are not all as closely connected to wars as has been describeded by Sir Richard Aikens. The first point to be made here is that Norwegian and Nordic marine insurance has developed along different lines from those moulding English marine insurance. The English law of marine insurance developed from the end of the 15th century onwards, mainly through court cases, and many of the cases presented by Sir Richard Aikens are from 15th to 18th centuries. The history of both Norwegian, and today Nordic, marine insurance is more recent, developed mainly through an agreed document called the Norwegian, and later the Nordic, Marine Insurance Plan. As this difference in development explains the difference in origin of several concepts, I will first outline how the marine insurance regulation has developed first in Norway, and later in the Nordic countries.

Thereafter, I will look more closely into the concepts that have been presented to us. To simplify the presentation, I will concentrate on hull insurance, although the concepts are equally relevant for freight – today mainly insured through loss of hire insurance – and also cargo insurance.

1 The article is based on a lecture given at a conference on marine insurance organized by Wikborg Rein and the Scandinavian Institute of Maritime Law, 13 March 2024.

2 The Nordic regulation of marine insurance – the history of the "Plan"

2.1 Introduction

Although all of the Nordic countries have extensive legislation regulating insurance contracts, these acts are not mandatory for marine insurance.[2] Instead, hull and hull-related marine insurance are regulated by an extensive contract which today bears the title Nordic Plan 2013 (NP). This plan is based on the Norwegian Marine Insurance Plan (NMIP or the Plan) 1996 Version 2010, which has a long history. The concepts developed through English court cases and coloured by the history of wars, therefore have a less dramatic history in the Nordic countries, where the Plan was developed through negotiations between all interested parties and influenced by the development of Nordic and continental legislation. However, as will be demonstrated below, the history of war has nonetheless also influenced the development of the Plan. Furthermore, the drafting of the clauses depended heavily on the chairman and secretary of the Plan drafting committees. Whereas UK clauses were developed by distinguished judges, Norway had average adjusters and professors of law.

It should also be noted that the Plan is a standard contract, drafted in a way that has great similarities to legislation.[3] First, contrary to the situation in England, the Plan is not written by the insurers. The Plan is an agreed document drafted by a committee consisting of participants from all interested parties, i.e. the ship-owners, the insurers, and the average adjusters. Until 2003, Det Norske Veritas (DNV) as a neutral party hosted the amendments and was responsible for the publishing and distribution of the Plan. From 2013, Cefor has taken over this task.[4] Professors from the Faculty of Law have participated in several of the revisions, and from 1964 onwards, a professor from the Scandinavian institute of Maritime Law has always functioned as chairman of the committee, while the secretary has always been a professor or PhD. candidate at the institute.

Second, broad participation in the drafting of the Plan has secured its neutrality and balance. This stands in contrast to many other standard conditions in the marine insurance market, which have been drafted by the insurers without participation by the assureds.[5]

A third characteristic feature of the Plan is that it contains a fully comprehensive regulation of all aspects of marine insurance. Both the structure of the Plan and the construction of the individual clauses are more similar to legislation than to ordinary standard contracts.[6]

Fourth, the Plan is supplemented by extensive and published commentaries (the Commentary).[7] The Commentary explains the provisions, the reasons for them and how they should be interpreted. New judgments are discussed and either included in the Commentary, with the acceptance of the committee, or else the

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2 See further Trine-Lise Wilhelmsen and Hans Jacob Bull, *Handbook on hull insurance*, 2 ed. 2017 (Wilhelmsen/Bull 2017) pp. 24–25.

3 See further Wilhelmsen/Bull 2017 p. 26 ff. See also Hans Jacob Bull, Avtalte standardvilkår som privat lovgivning, *Lov, dom og bok. Festskrift til Sjur Brækhus*, Oslo, Universitetsforlaget, 1988, pp. 99–114.

4 Wilhelmsen/Bull 2017 p. 26.

5 Wilhelmsen/Bull 2017 p. 26. See also Wilhelmsen, Planen som Nordisk Plan – forholdet til konkurrerende produkter, særlig engelske vilkår, *MarIus* 2019 MarIus (sjorettsfondet.no) .

6 Wilhelmsen/Bull 2017 p. 26.

7 All Commentaries to the 1996 Plan are published on Cefor's website The Plan (nordicplan.org) . Some of these are also published as hard copies.

provisions are amended if the judgment is not approved by the Committee.[8] Thus, an understanding of the main marine insurance concepts in the Nordic countries cannot be achieved by studying court cases, but instead by studying the development of the clauses in the Plan, which may be a result of court cases, but most often are not.

A fifth feature is the dynamic aspect of the Plan. In order to ensure that the Plan is continually updated, a Revision Committee was established after the amendment of the Plan in 1996.[9] The purpose of this establishment was to make supplementary conditions superfluous. A similar permanent Revision Committee was established after the 2010 revision of the NMIP, with the task of drafting and publishing the Nordic Plan in 2013.[10] This committee was also responsible for the 2016, 2019 and 2023 amendments of NP 2013 and will ensure the future ongoing maintenance and updating of the Plan every fourth year.

In the following, a brief overview of the history of the Plan is provided as a background for the presentation of the different concepts outlined in 1 above. The main point of this is to connect the history of the Plan to the history of war and other factors influencing the development of the Plan, and also to present the main drafters.

2.2 The first Norwegian Marine Insurance Plan 1871

The first Norwegian Marine Insurance Plan was published in 1871, more than 100 years after the case of Carter v Boehm (1766) 3 Burr 1905 (97 ER 1162), and almost 100 years after the formalization of the English SG (ships and goods) policy in 1779. Before 1871, the individual companies each had their own conditions.[11] However, agreement was reached among the marine insurers that they should establish a Norwegian Plan. The reason for this was the vast expansion of the Norwegian international fleet from around 1850, as well as the technical innovations in naval warfare that developed during first the Crimean war (1853–1855) and then the North American civil war (1861–1865). The growth of the Norwegian commercial fleet made it possible to sail in these waters and the wars increased the need for sea transport, resulting in higher freight rates.[12]

However, these wars also represented a military technical revolution in particular with the invention of the torpedo in 1862, which meant that sailing with a neutral Norwegian flag did not provide sufficient protection. This development influenced both the Norwegian marine insurers' general attitude towards marine insurance, as well as their calculation of risk and attitudes towards war risk insurance in particular. The more efficient maritime naval weapons, together with the increassed value of the vessels following the transfer from sailing vessels to steam vessels, led to a greater focus on calculating the risk involved and coverage possibilities. Both the marine insurers and the ship owners argued for better and more standardised conditions for marine insurance. The answer was the establishment of Det norske Veritas in 1864, followed by the publication of the Norwegian Marine Insurance Plan in 1871.[13]

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8 See further Trine-Lise Wilhelmsen, Choice of Forum in the Nordic Marine Insurance Plan – Regulation and Practice, *MarIus,* 2019, no. 515, pp. 72–95.

9 Wilhelmsen/Bull p. 30.

10 agreement-nordic-plan-03-11-2010---amended-09-12-2016.pdf (cefor.no)

11 Atle Thowsen, *Den norske Krigsforsikring for Skib*, Bergen 1988 (Thowsen), p. 22. The first marine insurance company in Danmark/Norge, "Det Kongelig Oktroierede Sø-Assurance Kompagni" was established in 1726, cf. Thowsen p. 13. The first Norwegian company of any significance was "Langesundsfjordens Skibsassuranceforening" (also called "Første norske") established 10. February 1837, Thowsen p. 16. This led to the establishment of several mutual insurance companies along the coast of Norway from 1837 until 1900.

12 Thowsen pp. 20–22.

13 Thowsen pp. 20–22.

The 1871 Plan covered vessel, cargo and freight and was drafted by a Plan Committee headed by the chairman of Veritas, Hr. Smith Petersen, with the average adjuster A. Winge as secretary. Also participating was the law professor Brandt.[14] The Committee discussed the newly revised Hamburgerplan, and reached the conclusion that it contained contradictory rules and that Norway had reached such a respectable status as a seafaring nation that it was reasonable for them to draft their own plan.[15] The draft was prepared by the average adjuster J. Aall Møller, who developed the Plan without regard to the revised Hamburgerplan, which he did not consider "good work".[16] His strategy was to make a new structure, aimed at making it easy to find the provisions and using as few words as possible.[17] It is interesting to note that this strategy – even if developed into several different structures and with different material content – has followed the development of the Plan to modern times, not least during the great revision in 1964 led by professor Sjur Brækhus. However, the structure of the 1871 Plan was apparently not a success, since it was completely revised 10 years later, and nor was there any mention in the Commentary of continental marine insurance jurists, or of English court cases.

2.3 The Plan revisions in 1881, 1894 and 1907

The Plan was revised in 1881, resulting in "a new plan" ("saa godt som helt ny") Plan.[18] The amendments were based on continental marine insurance legislation, market practise ("sedvane") and market conditions. It may well be that the works by the French jurists Valin, Pothier and Emerigon, as presented by Sir Richard Aikens were influential in this work, and that market practice also included English practice, but there is no mention of this. The Committee was headed by the average adjuster Axel Winge,[19] who was the secretary of the 1871 Plan.

A further revision took place in 1894, mainly as a result of the new Maritime Code.[20] The Committee was headed by average adjuster A. E Hangeland.[21] The aim this time round was not at new plan, but a revision of the 1881 Plan.[22] The main structure and framework were retained.[23] However, it was necessary to take into consideration the fact that the new Maritime Code contained a chapter on marine insurance. The Committee discussed whether the Plan should adopt this chapter in its totality and add Plan provisions as considered necessary, but chose instead to continue the Plan and supplement it with provisions from the Maritime Code. The reason for this was that the Norwegian Plan was well known, both in Norway and abroad, and accepted as a "helstøpt og godt Værk", and also that the MC contained mainly principles, rather than detailed regulation of the Plan.[24]

The Plan was revised again in 1907, with a great many amendments, both in content and editing.[25] This Plan was in effect during the first world war of 1914–1918, but it did not function well, cf. further below in 6.

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14 *Forhandlinger vedrørende sjøforsikringsplanen 1871* (Forhandlinger 1871) p. 1.

15 Forhandlinger 1871 pp. 1–2.

16 Forhandlinger 1871 p. 2.

17 Forhandlinger 1871 p. 3.

18 *Forhandlinger angaaende revideret almindelig norsk Søforsikringsplan, September 1894* (Forhandlinger 1894) p. 4.

19 *Norsk Sjøforsikringsplan av 1930*, Det norske Veritas, Oslo 1930 (NSPL/NMIP 1930), Forord.

20 Lov om Sjøfarten af 20. Juli 1893, Forhandlinger 1894 p. 4.

21 NSPL 1930, Forord.

22 Forhandlinger 1894 p. 5.

23 Forhandlinger 1894 p. 4.

24 Forhandlinger 1894 p. 5.

25 NMIP 1930, Forord.

2.4 The Plan revisions in 1930 and 1964

A new major revision of the Plan took place in 1930. The backdrop for this amendment was the new Nordic Insurance Contract Act 1930 and new regulation of shipowner's liability, but major amendments were also made to modernize the text and structure, in order to comply with contemporary language. This version was also sent for consideration by stakeholders and was published in English.[26] The preface does not mention World War I as a reason for the revision, but as will be seen below, this war heavily influenced the clauses on war risk and causation. The Plan Committee was headed by an average adjuster, Henrik Ameln, as chairman,[27] with Theodor Grundt, later professor in insurance law, as secretary.

The 1930 Plan was used for a longer period than any previous plan, but a major revision took place in 1964. The Committee was headed by professor Sjur Brækhus with professor Knut Selmer as secretary, both at the Scandinavian Institute of Maritime Law. There is no mention of World War II as a reason for the revision, but similarly to the 1930 revision, experiences from this war influenced both the regulation of perils insured against and causation.

In this 1964 version, a totally new structure was developed which was retained in the later revisions and also into the current Plan.

2.5 The Plan revision in 1996

The next revision was in 1996. The chairman was professor Hans Jacob Bull, with professor Trine-Lise Wilhelmsen as secretary, both from the Scandinavian Institute of Maritime Law.

The reason for the revision of the Plan in 1996 was partly that Norway had passed a new Insurance Contract Act in 1989. This Act is extremely consumer friendly, containing solutions not well adjusted to shipping companies operating internationally in competition with ship owners based in states with less protective insurance legislation, and thus cheaper premiums.[28] Even if the ICA is not mandatory for shipping, it was still necessary to analyze whether the Act made it necessary to adjust the regulation in the Plan and/or insert new provisions to depart from the ICA. Furthermore, the technical and economic developments since 1964 made it necessary to assess the provisions.

The revision in 1996 followed the structure of the 1964 revision, but modernized the organization of the chapters. The 1996 Plan was published in several versions: Version 1997, Version 1999, Version 2000, Version 2002, Version 2003, Version 2007, and Version 2010.[29]

In 2010, the Nordic Association of Marine Insurers (Cefor), which is responsible for the maintenance and publishing of standard marine insurance conditions in the Nordic market, decided that instead of operating with one set of standard conditions in each of the Nordic countries, efforts should be concentrated on a single shared set of conditions. As the basis for a set of unified Nordic conditions, Cefor chose the Norwegian Marine Insurance Plan 1996 Version 2010. An agreement was entered into between Cefor and the Norwegian, Danish, Swedish, and Finnish shipowner associations on 3 November 2010 to construct the Nordic Marine Insurance Plan of 2013, which then entered into force in January 2013. It was amended in 2016, 2019 and 2023.[30] The Plan in use today is therefore the Nordic Marine Insurance Plan 2013 Version 2023 (NP).

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26 NMIP 1930, Forord.

27 NMIP 1930, Forord.

28 See further on the relationship between ICA and marine insurance NOU 1987: 24 pp. 40–41. See also Ot. Prp. Nr. 49 (1988–89) p. 32.

29 Wilhelmsen/Bull 2017 p. 26.

30 See Wilhelmsen/Bull 2017 p. 26.

3 Insurable interest

The concept of insurable interest is found in the first Norwegian Marine Insurance Plan 1871 § 2, which states that any interest that anyone has in ships or in goods that are sent by sea, arriving in good shape and whose value may be calculated in money, may be insured. An insurance that does not cover an insurable interest is void. Gambling insurance is void. There was no reference to the interest being legal. It appears from the Commentary, that the concept of insurable interest was imported from the Harmburgerplan, but adjusted because the Hamburgerplan was legislation, whereas the Plan was a contract. It appears from the discussion in the Commentary that the main issue was whether the captain and crew could insure their "hyre", or salary. The point was that insurance of salary could result in the captain and crew being less intent on performing their work where their whole interest was not tied to the vessel's "happy arrival" at port.[31] It was noted that in England, the captain, but not the crew, was allowed to insure his salary. The provision in § 2 ended after voting took place to prohibit insurance of salary for captain and crew.[32]

The provision for insurable interest was retained in the Plan 1881 § 2, but now with the requirement that the interest must be legal, and bringing in a new rule that the captain's share of the vessel's freight could be insured as part of his salary ("kaplaken"). The provision was further retained in the 1894 version,[33] although after intense discussions on the insurability of the captain' and crews' salaries, because the prohibition against this was removed from the Maritime Code.[34] In 1907 this prohibition was also deleted from the Plan, but the requirements that the interest must be legal and have an economic value, as well as the prohibition against gambling insurance, were all retained.[35]

The provision is retained in NP 1930 § 2 (legal interest with economic value) and § 3 (gambling policies) although now in a more modern form. It conforms to the Nordic ICA 1930 § 35, and is also retained in NMIP 1964 §§ 5 and 6, although in a more modern version. The provision today simply states that a "contract concerning insurance which does not relate to any interest is void", cf. NP 2023 Cl. 2-1.

The rules relating to this principle were not included in the Norwegian ICA 1989, but the prohibition of illegal interests and gambling policies followed from other rules. However, the requirements for what constitutes insurable interest still qualify as a fundamental insurance law principle and this has raised problems in modern insurance, both in legal aid insurance and in casualty insurance for buildings in the case of transfer of ownership.[36]

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31 Forhandlinger 1871 pp. 3–4.

32 Forhandlinger 1871 p. 5.

33 *Revideret almindelig norsk Søforsikringsplan September 1894* (1894 Plan) § 2.

34 Forhandlinger 1894 pp. 5–11.

35 *Norsk Sjøforsikringsplan 1907* (1907 Plan) § 1.

36 Hans Jacob Bull and Trine-Lise Wilhelmsen, *Forsikringsrett*, 2 ed. 2024 (Bull/Wilhelmsen), p. 452 ff., in particular pp. 460–461.

4 Utmost good faith

The concept of utmost good faith is not used in Nordic marine insurance.[37] However, the duty of disclosure of the person effecting the insurance has a long history – but one which is not connected to war in particular. The regulation is first found in the 1871 Plan[38] § 26, stating that the insurance was void if the assured or the policy holder did not inform the insurer of any known circumstance that presumably would result in that the insurer not giving effect to the insurance at all or giving effect to it, but with a higher premium.[39] The provision did not give reason to any remark in the Commentary.

The regulation was retained in NMIP 1881 and 1894 § 28, but it was now spelled out in greater detail. The main addition here was that breach of the duty of disclosure resulted in the insurance being void unless the insurer knew or ought to have known of the non-disclosed circumstance. This was true even if the person effecting the insurance was acting in good faith. According to the Commentary 1894, the more extensive regulation was adopted from the Maritime Code.[40]

In 1930, the regulation of the duty of disclosure was placed in § 7 to § 11. The regulation conforms to the Nordic ICA 1930 and established the rules which are still used today. This regulation represented a central shift in the provisions, in favour of the assured. It is stated in the Commentary that the 1907 rules were unnecessarily strict, and that it was agreed that the person effecting the insurance should be protected if he gave his information in good faith. It was also argued that the insurance should not necessarily be void if the person effecting the insurance was negligent.[41] The main characteristic is a distinction between the definition of the duty of disclosure (§ 7), and the sanctions for breach of this duty (§§ 8 and 9). Furthermore, the sanctions are softened compared to earlier plans; although the sanction that the contract is not binding is still used for fraud and bad faith (§ 8), for negligence there is a complicated regulation based on the consequences for the insurance if the insurer had known of the non-disclosed circumstances (§ 9 no 1). If the person effecting the insurance is acting in good faith, the insurer is liable for any casualty, but may cancel the contract (§ 9 no 2).[42]

The Norwegian regulations from 1930 onwards are far less strict on the policy holder than was the principle of utmost good faith, as codified in the Marine Insurance Act 1906 in sections 17, 18 and 19.[43] The English regulation was criticized by the CMI in its work on harmonization of marine insurance in the 1990s, and presumably this was part of the reason why the duty of disclosure is now regulated by the Insurance Act 2015.[44] For this particular regulation, it appears that

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37 See further Trine-Lise Wilhelmsen, "Issues of marine insurance. Duty of disclosure, duty of good faith, alteration of risk and warranties", *SIMPLY Scandinavian Institute Yearbook of maritime law* 2001, p. 41 ff. at p. 103 ff., *CMI Yearbook 2000 Singapore I,* pp. 332–411 at p. 369 ff. cf. p. 347 ff.

38 *Almindelig norsk Søforsikringsplan Oktober 1871.*

39 In particular, it was emphasized that this included information about carriage of explosive or dangerous goods (letter a). The same was true if the insurer was given wrong information with the purpose of obtaining a reduced premium (letter b) or if the assured did not inform the insurer of the increase in the risk, after having requested the insurance but before it was contracted (letter c).

40 Forhandlinger 1894 pp. 34–35. The special rule on dangerous goods was deleted because the committee wanted a general and not a casuistic provision. In 1907 the provision was moved to § 4, but the content was mainly retained.

41 *Motiver til Norsk Sjøforsikringsplan av 1930*, Det Norske Veritas, Oslo 1930 (Motiver 1930) p. 9.

42 The regulation is continued in the *Norwegian Marine Insurance Plan of 1964*, Det Norske Veritas, 1964 (NMIP 1964) § 24 to § 30, NMIP 1996 and NP 2013 § 3-1 to § 3-7.

43 See further Trine-Lise Wilhelmsen, Issues of marine insurance. Duty of disclosure, duty of good faith, alteration of risk and warranties *", SIMPLY* 2001, p. 41 ff. at p. 70 ff. cf. p. 103 ff., *CMI Yearbook 2000* Singapore I, p. 332–411 at p. 369 ff. cf. p. 347 ff.

44 Wilhelmsen/Bull 2017 pp. 32–33.

the English regulation, developed during times of war, was now being influenced by the continental and Nordic approach to marine insurance.

5 Perils insured against – marine risks and war risks

5.1 The period until World War I

Perils insured against was defined in NMIP 1871 § 44 and included bad weather, rough seas, collision, ice, fire, theft, war and piracy. This continued the cover offered by the mutual insurance companies established in the period from 1837 onwards. The marine insurance corporations existing at the time were more restrictive in their coverage of hull insurance.[45] However, even if the risk of war was part of the general cover, the individual policy could exclude this risk through a special clause "Fri for Krigsmolest" (free from war risk).[46]

NMIP 1881 introduced the all-risk cover, i.e. that the insurance covered all perils that were not excluded, in § 42 sub clause 1, and no. 2 emphasized that the cover included war and intervention by state power. However, the insurance could also be limited to war risk (§ 50), or to marine risk (§ 51), or else the clause "fri fra krigsmolest" in § 52 could be inserted. This regulation was continued into NMIP 1894[47] and 1907,[48] and it appears that it functioned adequately for the Norwegian commercial fleet where sailing for a neutral nation, even if sailing in areas with military conflicts.[49]

5.2 The 1907 Plan and World War I

The war risk regulation in the NMIP 1907 did not, however, suffice for the challenges which arose following the outbreak of World War I between1914–1918. When the war broke out in 1914, a major part of the Norwegian commercial fleet was trading in European and North American ports.[50] The mutual associations had inserted a clause covering war risk if the port of departure or port of destination was not, to the knowledge of the assured, at war at the point in time when the vessel started to sail. The vessel was covered at sea, but if during the voyage it received information about war or risk for capture, it had to sail to the nearest neutral port.[51] With France, Russia, Great Britain and Germany as warfaring nations, the cover for war risk automatically ended if the vessel sailed to these countries. Norwegian vessels could only sail in the North Sea, the Baltic Sea, the White Sea and the English Channel either with special war risk insurance or else without insurance.[52] War risk insurance was difficult to obtain and the extent of cover uncertain.[53] This can be illustrated by the Tysla case:[54]

> D/S Tysla was hit by a Dutch torpedo and sank on 7 August 2015. The 1907 Plan § 39 covered damage because the voyage was affected by war, due to an act by the enemy. The question was whether the use of the torpedo was an act by the enemy, since the torpedo was from an allied country.

45 Towsen pp. 16–17.

46 NMIP 1871 § 20.

47 NMIP 1894 § 42 no. 2 and §§ 50–52.

48 NMIP 1907 § 22 sub clause 1 and sub clause 2 and § 30 and § 31.

49 Towsen p. 26.

50 *Krigsforsikringen for norske skip*, Oslo 1936, p. 9, Towsen p. 28.

51 Towsen p. 28.

52 *Krigsforsikringen for norske skip* p. 9, Towsen p. 28.

53 *Krigsforsikringen for norske skip* pp. 9–10.

54 Schelderup: Krigsforsikringsreglene for Skib og deres anvendelse under verdenskrigen, *Krigsforsikringen for norske skib*, 1927, p. 19 ff.

> The admiralty court decided in 1916, confirmed by the Supreme Court on 16 January 1918, that this was the case, and that it did not matter whether the torpedo was sent by an enemy for the purpose of attack or by an allied state for the purpose of defence.

The problem of obtaining war risk insurance resulted in the establishment of a mandatory mutual war risk insurance through legislation on 21 August 1914 that lasted until the end of the war, in order to provide for a better cover.[55] Even though now organized differently, the establishment of a separate war risk association has been retained in the Norwegian marine insurance market, cf. below 5.4.

5.3 Post World War I

In the 1930 revision of the Plan, the committee remarked that the provisions of the 1907 Plan failed on several accounts in terms of the distinction between marine risk and war risk during World War I.[56] This resulted in a central shift in the distinction between marine risk and war risk. The main structure of the regulation was retained: a simplified version of the all-risk cover was retained in NMIP 1930 § 4, but with separate clauses giving an exclusion for war peril in § 42, and coverage for war peril only in § 43. The new factor was the description of the war peril. Under the 1907 Plan, the war risk was defined in § 39 as damage because a war peril "udøver Indflytelse på Reisen", followed by certain examples. It was noted that the 1907 Plan was written at a time when war perils other than capture at sea, condemnation in prize and looting of neutral commercial vessels were unknown.[57] The war created new perils: to avoid attack, the vessels started sailing, early on during the war, with darkened lanterns and in convoy.[58] These concepts, as well as concepts like "spurless versenkt", darkened lighthouses, change of sea marks, torpedo fields, and other war perils, were unknown. The new Plan was intended to address these concepts in a different way.[59] The problem is illustrated by the Tysla case referred above, and Schelderup argues that this case destroyed the barrier created by the concept of "act of enemy" to describe a natural concept of war.[60]

In line with this, NMIP 1930 § 42 to § 44 spelled out the war risk in much greater detail, based on the principle that the war risk insurers should cover all "typical" war risk damage, that is to say, damage that according to its type or cause is a result of war, and is not expected in times of peace.[61]

5.4 Separate war risk insurance: The Norwegian War risk association

In the period after 1930, there was political unrest in different parts of the world. National unrest in Greece resulted in the Aegean Sea being closed to passage, and China had experienced political unrest since the abdication of the emperor in 1912. In 1935 this developed into civil war, with the right wing Chiang Kai-shek against the left wing Mao Tse-tung. Japan used this unrest to attack Manchuria and engaged in a military conflict with China that would last until 1945. Added to this

55 Towsen p. 28 ff.

56 Motiver NMIP 1930 p. 28.

57 Towsen p. 65 referring Thorolf Wikborg, who was a member of the 1930-Plan Committee. See also Schelderup p. 19.

58 Schelderup p. 25.

59 Towsen p. 65 referring Thorolf Wikborg. See also Schelderup p. 19.

60 Schelderup pp. 19 and 21.

61 Motiver NMIP 1930 p. 28.

was Adolf Hitler coming into power in Germany which caused a lot of concern, as well as increasing problems in Italy and Spain.[62]

This political instability took place in a period which saw extensive growth of Norway as a shipping nation. The cheap and old multipurpose steam vessels were exchanged for costly motor driven liners and tank vessels. This growth and the structural changes were partly financed by borrowed capital, mostly credit given by foreign building yards.[63] The combination of political unrest and the vast Norwegian investments resulted in the establishment of the Norwegian War Risk Association in 1935 to cater for the ship owners and creditors needing to protect their new investments against the war risk.[64] The Association was modelled on the UK mutual war risk associations that continued to offer war risk insurance after World War I with no premium, except a low fee per ton for administration and dividing the war losses when they occurred.[65]

War risk insurance for Norwegian registered ships was almost without exception effected by the War Risk Association.[66] The Association used their own conditions – the War policy or Wpol. These conditions were not included in the 1930 or 1964 Plan, but were instead built on the Plan's definition of war risk. The Wpol was however included as part of the 1996 Plan in chapter 15. The conditions conformed substantially to what was offered in the commercial market, but with better cover for ships registered in Norway on certain points.[67] However, when the Plan was adopted for Nordic use in 2013, the special provisions for ships registered in Norway was removed from the Plan. The War Risk Association today effects insurance based on the Plan, but with better protection in several areas.[68]

5.5 World War II and the 1964 revision – marine and war as split insurances

The above presentation demonstrates that whereas the all-risk principle with its common insurance for marine and war perils appeared to be the principal cover, in reality, marine risks were covered but with exclusion for war risks and war risk was covered mutually by the ship owners during World War I, and from 1935 by the Norwegian War Risk Association. There was no "united" marine and war cover. This resulted in a lot of court cases during World War II dealing with the distinction between marine and war perils.[69] In these cases, the organization of marine risk insurance with an all risk cover excluding war risk, as well as the named perils principle to define the war risk cover, could cause special difficulties, because legal interpretation principles and burden of proof rules would tend to

62 Towsen pp. 66–67.

63 Towsen p. 69.

64 Towsen pp. 71 ff.

65 Towsen p. 71.

66 *Commentary to Norwegian Marine Insurance Plan 1996 Version 1999*, Det Norske Veritas 1999 (Commentary 1996 Version 1999), p. 348, Sjur Brækhus and Alex Rein, *Håndbok i kaskoforsikring*, 1993 (Brækhus/Rein) p. 56.

67 Commentary 1996 Version 1999 p. 348. The added protection was in particular cover for requisition for ownership or use by a foreign state power, § 2-9 sub-clause 3 letter a, and losses which are a direct and immediate consequence of an explosion caused by the use of nuclear arms for war purposes, provided that the ship has not proceeded beyond the ordinary trading limit, cf. § 3-15, sub-paragraph 1. Damage caused by radiation or radioactive fall-out is nonetheless not covered (letter b). In later revisions, the special conditions for the Norwegian War Risk Association was included in chapter 15 section 9.

68 The conditions today are Insurance Conditions (01.02.2023).

69 For instance ND 1942 p. 406 NA *Heimvard*, ND 1944 p. 113 NA *Troma*, ND 1945 p. 344 NA *Dixie*, ND 1946 p. 225 NA *Anfinn*, ND 1947 s. 465 NA *Rogaland*, ND 1948 p. 4 NA *Storfjeld*, see Bugge *AfS* nr. 1 p. 1 at pp. 14–15.

widen the marine cover and narrow the war cover.[70] One issue was whether the marine insurers had the burden of proving that a loss was not caused by war peril. This issue was solved by the Supreme Court in ND 1956 p. 129/Rt. 1956 p. 449, where the Supreme Court held that neither insurer should have the burden of proof, but instead used a division principle.

> S/S *Banan* was damaged by fire in the bunker in Sydney, Nova Scotia, in November 1939. There was no information as to any war risk and it was presumed that the fire was caused by self-ignition. The marine insurer covered the damage. During and after the war, however, new information indicated that the damage was caused by German saboteurs having installed measures to cause fire in the tank. The assured claimed against the War Risk Association for cover for the franchise he had paid.
>
> The Supreme Court stated that this was not a question of whether the damage was war damage as defined in NMIP 1930,[71] but whether the fire was caused by a war peril.[72] The court also referred to the War policy cover for «Borgerlige uroligheter», which included cover for sabotage. However, the court presumed that the concept of «sabotage» referred to its traditional meaning, because war sabotage was not known when the Plan was written. War sabotage therefore had to be covered as an ordinary war peril.
>
> The court further found that it was clear that the damage was caused either by a war peril or by a marine peril, but it was not possible to assess whether one peril was more likely to have caused the damage than the other. In this situation, it was natural to use an analogy of the regulation of division of liability in the event of a combination of causes.[73] The liability was therefore divided between the insurers with 50% each.

Referring to this case, the Commentary to the 1964 Plan states that in spite of the formal organization of the two types of insurance, they should be seen as equal contracts of insurance.[74]

5.6 Faults by master or crew as marine or war peril

In the extensive case law for the period during and after World War I, it was regarded as clear that any faults or negligence committed by the master or crew relating strictly to their service as seamen, should be regarded as an independent peril which fell within the marine-risk insurer's area of liability. In this respect international tradition was being followed. As the chances of faults and negligence being committed will, as a rule, be far greater in times of war than in times of peace, because navigation is that much more difficult, this in actual fact meant that the marine-risk insurer had also to accept a general increase in risk, owing to the war situation.[75]

The problem is more difficult if the fault or negligence of the crew is more closely tied to the war peril. An example of this is Rt. 1921 p. 424 *Solglimt*:

> The vessel *Solglimt* was on a voyage from Fredrikstad to Buenos Aires when the crew 10 August observed what they thought was a torpedo sent

70 *Motiver til Norsk Sjøforsikringsplan av 1964, Rederplanen*, Det Norske Veritas 1964 (Motiver NMIP 1964), p. 16.

71 With reference to NMIP 1930 § 43 no 1 first sentence and § 42 no 2.

72 With reference to NMIP 1930 § 43 no 1 second sentence and § 42 no 1, third sentence.

73 See NMIP 1930 § 43 no 2 and § 42 no 3, which refers to the provisions in § 34 no 2

74 Motiver NMIP 1964 p. 16.

75 Motiver NMIP 1964 p. 18, Commentary NMIP 1996 Version 1999 p. 41, Brækhus/Rein pp. 64–65.

> from a submarine. The torpedo did not hit the vessel, but went under the hull and continued on the other side. The crew abandoned the vessel in the lifeboats and left the area. The vessel was never found. The question was whether the loss of the vessel should be covered as a marine peril or as a war peril.
>
> The Supreme Court found it most likely that the crew had misjudged the situation and that *Solglimt* had not in fact been attacked by a submarine. The war risk insurer could not be liable for a peril unless it was proved that the peril was a war peril. It was understandable that the crew went into the life boats to assess the situation, but it was negligent to leave the area and the vessel. This negligence was assessed as a marine peril.

The judgment is criticized in legal theory,[76] and it appears that the Commentaries to the later Plans argue that faults tied to the war situation should be regarded as a war peril:[77]

> "However, it is conceivable that faults or negligence on the part of the master or crew must be covered by the war-risk insurer, *viz.* where such fault or negligence is very closely bound up with the war peril or consists in a misjudgement of this peril. It is, for example, conceivable that the officers are exhausted after having been subjected to the pressure of war for a long period of time and, as a result thereof, make a clear navigational error, or that the crew leaves the vessel under the misapprehension that there is an impending risk of war (cf. the "Solglimt case", Rt. 1921. 424). In practice, it is also conceivable that the reasons given for the judgment will be that the crew's conduct in the given circumstances must be regarded as excusable; in other words, that no actual "fault or negligence" has been committed."

5.7 Measures by own and foreign state

As is demonstrated above, the concept of war risk has developed from capture at sea, condemnation of prize, and looting of neutral commercial vessels, to include perils attributable to war or warlike conditions or other implements of war.[78] The content of this clause was mapped out in court cases, in particular during World War II, and mentioned in the Commentaries as being relevant for the interpretation of the provisions,[79] but it appears to cause fewer problems in more modern times, although the wars in Ukraine and Gaza may give raise to further cases.

In the period after World War II, another issue has caused difficulties in the Nordic marine insurance market, and that is intervention by own and foreign state in cases of political unrest or war. NMIP 1930 § 4 had no exclusion for intervention by own state power, but covered the classic war interventions as a war peril. In April 1940 the Norwegian Shipping and Trade Mission (Nortraship) was established to administer the Norwegian fleet outside German territorial waters, being those requisitioned by the Norwegian government to support the allied war efforts. The ships were insured with the Norwegian War Risk Association but with an addendum that the UK took over the insurance if the vessels sailed to allied ports.[80]

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76 Brækhus/Rein p. 65.

77 Commentary NMIP 1996 Version 1999 p. 41. See also Motiver NMIP 1964 p. 18.

78 NMIP 1964 § 16 letter a, NMIP 1996 § 2-9 letter a, and NP 2013 § 2-9 letter a.

79 Motiver NMIP 1964 p. 18, Commentary NMIP 1996 Version 1999 pp. 39–41, see also Brækhus/Rein pp. 58 ff. with extensive references.

80 Motiver NMIP 1964 pp. 19–20.

There was never any question of the marine risk insurer paying for the requisition of the Norwegian fleet, but the issue was addressed in the 1964 revision. The cover for interventions by foreign states, including requisition, was retained.[81] However, an exclusion was inserted in the all risk cover for "measures taken by Norwegian or allied State authorities".[82] It was argued that such cover was possible, but that the war risk insurer did not want to offer it, because such cover could influence the position of the assured against the authorities, who, according to ordinary principles of expropriation, should pay for the goods that were requisitioned.[83]

Under the 1996 revision two major changes were made to this cover. First, requisition by a state power was excluded from the war risk cover.[84] The reason for this was that the reinsurance market was not prepared to cover this risk.[85] Even so, such cover was included in the cover of the Norwegian War Risk Association.[86]

Second, the 1964 exclusion, for "measures taken by Norwegian or allied State authorities",[87] was broadened to "intervention by a State power", including both own and foreign state power. This exclusion was meant to include requisition by own State power.[88] The result was that interventions by a State power not covered by the war risk insurance would not be covered by marine insurance at all. This amendment was probably not analysed thoroughly and turned out to be a problem in various different directions.[89]

In particular, the concept of "other similar interventions" raised problems in situations where vessels were detained in foreign ports in unstable countries and kept there for a long period without a clear legal basis. The problems are demonstrated by several arbitration awards.[90] The *Germa Lionel* award (unpublished) and ND 1988.275 NA *Chemical Ruby* both concern detainment in port:[91]

> *Germa Lionel* was on a voyage from London to discharge her cargo first in Tripoli, thereafter in Benghazi in Libya. During the approach to the port of Tripoli the vessel had problems with the electric wiring which caused a lamp to blink. The Libyan authorities suspected that the vessel was communicating with groups in Libya which were opposed to the President, Colonel Ghaddafi. When the vessel had berthed, Libyan troops boarded the vessel. The crew was interrogated. One of the crew members died of mistreatment. The authorities checked the cargo and the vessel, but it appeared that the suspicions were without any foundation. The vessel's agents in the port incurred some costs, and the question was if these costs were covered by the war risk insurance. The main issue for the arbitrator was whether the Libyan authorities' action could be seen as a reasonable action as part of enforcing Libyan laws. The interrogation

81 NMIP 1964 § 16 letter a first sentence.

82 NMIP 1964 § 15 letter b.

83 Motiver NMIP 1964 pp. 19–20.

84 NMIP 1996 § 2-9 sub clause 1 letter b last sentence.

85 Commentary NMIP 1996 Version 1999 p. 45.

86 NMIP 1996 § 2-9 sub clause 3 letter a, Commentary NMIP 1996 Version 1999 p. 45.

87 NMIP 1964 § 15 (b), Motiver NMIP 1964 p. 15. The following is based on Wilhelmsen, Marine insurance intervention by State power – The Nordic perspective, *SIMPLY* 2018 (Wilhelmsen 2018), p.153 ff. at p.158 ff.

88 Commentary NMIP 1996 Version 1999 p. 45. The interpretation is not obvious, see further Wilhelmsen 2018 pp.183–185.

89 See further Wilhelmsen 2018 pp. 172–188.

90 See further Wilhelmsen 2018 p. 180–181, Brækhus/Rein pp. 73–76 and Wilhelmsen/Bull 2017 pp. 94–97.

91 Referred from Wilhelmsen 2018 p. 180–181.

> of the crew and the harshness shown were found to be of a nature which constituted a war peril under the Plan.
>
> In the *Chemical Ruby* case the vessel was detained for about 6 months by Nigerian authorities based on an unfounded suspicion that the vessel had tried to ship contaminated soya oil into the country. The starting point was that it was an enforcement of Nigerian legislation, and thus not a war risk. Even though it took about 6 months for the vessel to be released, this was not so extraordinary as to constitute a war risk. The detainment was not made to achieve some political gain or motivated by purposes which would be typical for war and war-like conditions, as opposed to a State's right to enforce compliance with national laws.

The decisions in these two cases, are further analyzed in ND 2016 s. 251 NA *Sira*:[92]

> *Sira* arrived at Lagos, Nigeria, 1 February 2015 for discharge of palm oil, and was boarded the same day by a security team engaged by the ship-owner, consisting of an unarmed British security advisor and four armed men from the Nigerian Navy. Permission had been obtained in advance from the immigration authorities for the advisor to visit *Sira* for inspections. Between 2 and 14 February, *Sira* and its documents were inspected several times by the Nigerian Maritime Administration and Safety Agency (NIMASA), whose task it is to secure safety at sea. On 5 February there were two attempts to board *Sira,* presumably by Nigerian pirates, which were stopped by the security guards on board. On 14 February the cargo was discharged and *Sira* was ready to sail. However, the captain was told by NIMASA that *Sira* could not sail before this had been clarified with the Commanding Officer. On 13 March NIMASA formally arrested the ship because it had a foreign security advisor on board, which was claimed to be «illegal and unacceptable as it is not supported under our constitution». *Sira* was released on 31 March after having signed a letter of indemnity holding NIMASA harmless for losses caused by the detainment. The owner argued that the detainment of *Sira* constituted a war peril according to NP Cl. 2-9 letter (b), whereas the insurer argued that the detainment was outside the scope of this provision.

The arbitrator made the following summary on the cover for "war risk" interventions:

> "For the intervention to be covered under the war risk insurance, the intervention must be made for the furtherance of overriding political goals. Such interventions are interventions typical for war and times of crises, and can often be explained by foreign policy considerations. The reason for the intervention may be a warranted or unwarranted suspicion that the ship has breached rules to protect the security of the State involved. It is not decisive that the general political situation in the State involved has been contributory to the intervention.
>
> A State intervention which is tied to regulation or control of normal commerce and shipping is not covered by war risk insurance. Relevant interventions will first and foremost be tied to breach or suspicion of breach of customs, currency, or police legislation. It is normally not decisive if such intervention due to its duration represents misuse of power. However, this can be different if the misuse of power takes the form of a

92 See further Wilhelmsen/Bull 2017 pp. 98–99, Wilhelmsen 2018 p. 181–183. The case is referred from Wilhelmsen 2018 pp. 181–182.

> regular police act or similar act, but which in reality is part of an action motivated primarily by overriding political objectives."

The arbitrator found, based on these guidelines, that the detention of *Sira* did not constitute "other similar interventions" with regard to NP Cl. 2-9 sub-clause 1 letter (b). Even if a detention of 1 ½ months did constitute an "intervention", it was not documented as to whether the action was motivated primarily by political objectives. Such objectives would typically be decided by the central authorities, such as the president, the parliament, the government at large, or a particular ministry, whereas NIMASA was an organ at a lower level in the State hierarchy, which exercised its agency within a legal framework and in conformity with political guidelines provided by others.

The detainment of Sira in Nigeria was one of several examples of vessels being detained in port in cases involving political unrest and instability. Other examples were the vessels *B Atlantic* in Venezuela and *Poavosa Ace* in Algeria. Such cases often included some fraudulent or criminal behaviour by a third party, for instance by the charterer or the receiver of the goods.

Under the 2019 revision it was therefore agreed that the cover for state-intervention had to be amended, both to clarify the concepts and to provide a better cover in cases where vessels were detained in port. The main results of the discussions were as follows:[93]

1) Requisition by state power is not covered by any insurance;[94]
2) the marine risk insurance excludes certain qualified interventions by own state power, provided these have been made for the furtherance of overriding national political goals,[95]
3) the war risk insurance does cover such interventions by foreign State power or by a supranational power;[96]
4) the all risks cover in NP Cl. 2-8 first part covers interventions by own and foreign state power and supranational powers that are neither excluded in Cl. 2-8 b and c, nor covered by Cl. 2-9 sub clause 1 b, i.e. interventions other than requisitions that are not made for the furtherance of overriding political goals.

The result of the amendment is that the war risk cover for interventions by a foreign state power is clarified, whereas the marine risk cover for state interventions is made significantly broader. It should be noted, however, that the distinction between marine and war risk cover is maintained with regard to the losses covered.

93 Wilhelmsen 2018 pp. 189 ff.

94 NP 2013 Version 2019 Cl. 2-8 c, Cl. 2-9 sub clause 2 c.

95 NP 2013 Version 2019 Cl. 2-8 b.

96 NP 2013 Version 2019 Cl. 2-9 sub clause 1 b.

6 Causation

Until the NMIP 1930, the Plan contained no specific regulation on causation, and it appears that the issue did not cause specific problems until World War I. However, during this war, several cases involving a combination of marine and war perils were heard. In a judgment of fundamental importance, the Admiralty Court, with the support of the Supreme Court, cf. ND 1916 p. 209 *Skotfos*, established that the entire loss was attributable to "the factor which is regarded as the dominant cause of the accident".[97]

> *Skotfos* was stranded in January 1915 on Orknøyene, partly because the navigator had misjudged the current, partly because the North Ronaldshay lighthouse was darkened due to the war. The liability for the damage was attributed to the insurance against marine perils. The majority of the Supreme Court, – 6 out of 7 judges – agreed with the result and mainly also to the reasoning by the court of Admiralty. The court of Admiralty stated i.a. (referred from ND 1916 *p.* 76 at pp. 78–79) that a casualty was normally due to several different causes. However, common opinion would hold that, the situation would normally be that the characteristics of the casualty are decided by one factor, which is the main cause of the accident. From a logical point of view, several factors might be necessary pre-conditions for the accident and be of similar importance. In legal reasoning, however, one should distinguish between the significant and the insignificant. The significant factor was the one that brought the accident into actual effect and gave it its specific characteristics. The expressions: damage caused by, following, due to, or similar, should be interpreted in this light. In cases with several interconnected causes, one should look for the central aspect, the main cause, the dominant characteristic feature, and not the less significant parts of the situation. This should also be the approach for to interpreting the marine insurance plan and the starting point for assessing Skotfos's stranding. The court did not doubt that the stranding was caused by a marine peril and thus constituted a marine accident. The vessel grounded because it drifted further due to current than the navigator realised. It was possible that the stranding could have been prevented by light in the North Ronaldshay lighthouse. But even if the darkening of the light was a war peril, it did not make the stranding a war accident, as it only had minor significance in the circumstances in which the sailing took place, and could not be seen as determining the characteristics of the accident.

The reasoning in the *Skotfos* case was followed in all later judgments after World War I for combinations of causes between war perils and marine perils.[98] It should be noted that these judgments, together with some cases from accident insurance, concerning cases where an insured person who had been in an accident died as a result of a combination of the accident and illness,[99] established the dominant cause rule as the main rule for causation in Norwegian insurance law.[100] The causation principle entails the establishing of which peril constitutes "the dominant-cause factor" or "the dominant peril". The entire loss shall be allocated to the

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97 See Bull/Wilhelmsen pp. 287–288, 290–291, Commentary NMIP 2023 p. 81.

98 Cf. for instance Rt. 1917 p. 1008 *Valhall*, Rt. 1921 p. 424 *Solglimt*, Rt. 1921 p. 516 *Nanset* and Rt. 1921 p. 619 *Europa*. See also Trine-Lise Wilhelmsen, Årsaksprinsipper og tolkningsprinsipper i forsikringsretten, *Tidsskrift for Erstatningsrett og forsikringsrett*, 2011 no. 4 (Wilhelmsen 2011), pp. 228–258, at p. 239.

99 See in particular Rt. 1901 p. 706, Rt. 1904 p. 600 and the overview in Rt. 1933.931.

100 Bull/Wilhelmsen p. 288, Brækhus/Rein p. 259.

peril which is thus designated as the dominant cause. This means that the assured will either receive full cover or none at all, depending on which peril is regarded as dominant.

A feature common to the marine insurance decisions was, however, that it required a very great war peril for the court to regard that peril as the dominant cause. If errors of any significance had been committed by the crew, such errors were practically always regarded as the dominant cause, with the result that the casualty in its entirety fell upon the marine-risk insurer.[101]

The marine-risk insurers objected to the fact that this led to a significant part of the increase of the marine risk attributable to a war situation (darkened lighthouses, removal of navigation marks, sailing in convoys etc.) being imposed on them. In connection with the revision of the Plan in 1930, the Committee therefore decided to adopt a rule of apportionment. In the event of a combination of causes, the relative strengths of the various perils were to be evaluated and the loss apportioned, taking into consideration the significance of the individual causal factors. Instead of a choice between two extreme solutions (either A or B being liable for the entire loss), this method offered a whole range of in-between solutions, making it possible to choose in each individual case the apportionment which would seem to best fit the specific circumstances of the case.[102]

The background for the introduction of the rule of apportionment in 1930 was the conflict between the insurers against marine and war perils, respectively. However, the rule of apportionment contained in the 1930 Plan was worded in very general terms, and was to be applied to all cases where there was a combination of perils insured against and uninsured perils, unless otherwise provided by other provisions of the Plan.[103]

During World War II (1940–45), the rule of apportionment was applied in ca. 100 court cases concerning casualties which were partly attributable to war perils and partly to general marine perils.[104] On account of this high incidence of litigation, the decision was made in the revision of the Plan in 1964 to revert to a dominant-cause rule in respect of the combination assessment between war and marine perils, although in a modified version.[105] The discretionary rule of apportionment was retained, however, for other combinations of causes and also made applicable in the event of a combination of perils insured against and perils which had arisen due to neglect or negligence on the part of the person effecting the insurance or the assured.[106] The reason was that the rule of apportionment had gradually become part of the general conception of justice, and that in practice it was applied fairly frequently in settlements.[107] It was rarely used, however, in case law.[108]

This regulation was retained in the 1996 revision and is still upheld. The Commentary provides the following reasons for this decision:[109]

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101 Motiver NMIP 1964 pp. 27–28, Commentary NMIP 1996 Version 1999 p. 60, Selmer, *Forsikringsrett*, 2 ed., 1982 (Selmer) pp. 249–250, Brækhus/Rein p. 259.

102 Motiver NMIP 1964 p. 28, Commentary NMIP 1996 Version 1999 p. 60, Selmer pp. 249–250, Brækhus/Rein p. 259.

103 Motiver NMIP 1964 p. 28, Commentary NMIP 1996 Version 1999 p. 60, Selmer pp. 249–250, Brækhus/Rein p. 260.

104 Commentary NMIP 1996 Version 1999 pp. 60–61, Selmer p. 250. These questions are discussed thoroughly by Bugge in AfS 1 pp. 1–26. See also Brækhus/Rein, pp. 262 ff.

105 NMIP 1964 § 21, see Commentary NMIP 1996 Version 1999 p. 61, Selmer p. 250,Brækhus/Rein p. 260.

106 NMIP 1964 § 20, see Commentary NMIP 1996 Version 1999 p. 61–62, Selmer p. 250, Brækhus/Rein pp. 260–261.

107 Commentary NMIP 1996 Version 1999 p. 61, Selmer p. 251, Brækhus/Rein p. 261.

108 Commentary NMIP 1996 Version 1999 p. 61.

109 Commentary NMIP 1996 Version 1999 pp. 61–62.

> "The advantage of this solution is that the premium is in "correct" proportion to coverage in that the insurer is not held liable for the effect of causal factors that fall outside the scope of cover of the insurance. Also considerations of fairness favour such a solution: the assured has paid a premium to be covered against certain risk factors and has no reasonable claim to be covered against other perils. A third advantage is in the relationship to the rules relating to the duties of disclosure and care: under ICA, a reduction system as regards the assured's breach of the duty system contained in ICA chapter 4 has been established, which entails that the indemnity may be reduced if the assured's breach of duty has contributed to the damage. Such a system is less expedient in marine insurance: it is regarded as unfortunate for the insurer to be allowed to make a discretionary reduction based on inter alia considerations of degree of fault. By retaining the rule of apportionment, a more or less equivalent possibility of reduction is, however, achieved by virtue of the fact that a breach of the duty of disclosure or care in the event of a combination of causes can be allocated such a proportion of the loss as indicated by the significance of the breach. A flexibility in the claims settlement is thereby achieved which may put less of a strain on the relationship between the insurer and the assured than a strict reduction based on an evaluation of fault. One advantage of this solution is that the premium is in "correct" proportion to the insurance cover in that the insurer is not held liable for the effect of causal factors that fall outside the scope of cover of the insurance. A second advantage is considerations of fairness: the assured has paid a premium to be covered against certain risk factors and has no reasonable claim to be covered against other perils. A third advantage is the flexibility created in cases where an objective peril interact with subjective breaches of the duties of disclosure and care. The Norwegian Insurance Contracts Acts has established a system with discretionary reduction of liability in case of such breaches. This approach is not convenient in marine insurance as it is regarded as unfortunate for the insurer to be allowed to make a discretionary reduction based on *inter alia* considerations of degree of fault. The rule of apportionment, however, provide a more or less equivalent possibility of reduction by treating a breach of the duty of disclosure or due care as a cause interacting with objective causes and being attributed weight depending on the degree of fault. A flexibility in the claims settlement is thereby achieved which may put less of a strain on the relationship between the insurer and the assured than a strict reduction based on an evaluation of fault."

This provision is therefore one of the few examples where wars have been an important factor for developing marine insurance.

7 Constructive total loss and notice of abandonment

Sir Richard Aikens describes constructive total loss as being where an insured can claim for "total loss of the subject-matter insured even when it is not completely lost by an insured peril, e.g. such as when sunk, or blown up, provided the insured can show that the object's ultimate loss appears to be unavoidable or its loss could not be avoided without an expenditure that would be more than the object's value after the expenditure has been incurred." In Nordic terminology CTL refers to condemnation, which covers the situation where the cost of repair exceeds 80 % of the insurable value of the object insured.[110] Abandonment is regulated together with a missing ship as one type of total loss. In addition, however, NP chapter 15 on war risk regulates "Intervention by a foreign State power, piracy" (Cl. 15-11) and "Blocking and trapping" (Cl. 15-12). As these clauses were first included in the NP in 1996 and taken from the War policy, the history of the Plan sheds little light on them.

Cl. 15-11 solves the problem of how long the detention had to last, an issue which was not solved through the English court cases, but instead in the detention clause: the assured must have been deprived of the vessel for 12 months, provided that if it is established before this time that the assured will not recover the vessel, he may claim for total loss immediately. It is not relevant to this assessment, whether the vessel is released at a later time.

NP also contains a provision on blocking and trapping that is interesting in the light of Royal Boskalis Westminster NV v Mountain [1997] LRLR 523, which arose out of Saddam Hussein's invasion of Kuwait. The insured's dredgers were working in the Shatt al Arab and were detained. The insured gave a notice of abandonment of the vessels, claiming a CTL. This situation could potentially be regulated by NP Cl. 15-12:

> "If the vessel is prevented from leaving a port or a similar limited area due to blocking, the assured may claim for a total loss, if the relevant obstruction has not ceased within twelve months after the day it occurred."

In appears from the Commentary[111] that this provision was aimed at covering a vessel that

> "remains trapped in a canal, etc., because the lock gates or other structures have been destroyed. The events in Shatt-al-arab during the Iran-Iraq war and in the Suez Canal during the war between Israel and Egypt are examples of this type of situation. The provision will not apply, however, if a general cargo vessel is prevented from leaving the Great Lakes because the lock gates have been bombed in the St. Lawrence Seaway. By contrast, in relation to the Strait of Hormuz, the provision must be given a wide interpretation. Accordingly, if an oil tanker is unable to get out of the Strait of Hormuz during a conflict, e.g. because the Strait has been mined, the provision will apply."

The provision does not explain who may perform the "blocking". It obviously covers blocking by foreign states for overriding political reasons, but it also presumably covers blocking by pirates and other groups covered by war insurance,[112] cf.

110 See today NP 2023 Cl. 11-3.

111 Commentary NMIP 1996 Version 1999 p. 355.

112 NP § 2-9 sub clause 1 d also covers riots, sabotage and acts of terrorism.

ND 2009.202 NA *Bulford Dolphin* below.[113] It is more uncertain whether the concept of "blocking" includes non-physical measures and also how the geographical limits contained in the expression "port or similar limited area" should be interpreted in light of the geographical references provided in the Commentary.[114] These issues were addressed in ND 2009.202 NA *Bulford Dolphin* with regard to the similar provision in Cl. 15-16 concerning loss of hire insurance under the war risk cover in case of blocking and trapping:

> The drilling rig Bulford Dolphin was anchored off the coast of Nigeria in the Niger delta during a drilling operation. The rig was attacked by armed pirates. The attack resulted in loss of hire and costs to evacuate the rig. The owner claimed cover for loss of hire and mitigation costs from the war risk insurer, and argued that the rig was blocked and trapped by pirates in the Niger delta. The parties agreed that the rig was not anchored in a «port or similar limited area», but the assured claimed that the situation was nevertheless covered by the provision, due i.a. to the examples used in the Commentary. The Strait of Hormuz was of a size equal to Great Britain, and it was therefore difficult to see a reason to exclude the Great Lakes. The owner therefore argued that the wording of § 15-16 should be interpreted widely. The court, however, did not agree and argued that the Commentary illustrated the natural understanding of the expression «port or similar limited area» with the exception of the reference to the Strait of Hormuz. This reference could be explained by reference to the similar cover in the Norwegian War Risk Association which were presumed to cover this situation, and the Plan Committee did not want to depart from these conditions. This explanation did not provide a basis for a more general widening of the scope of § 15-16.
>
> With this conclusion, it was not necessary to discuss whether non-physical blocking (threats) by pirates was covered, but the court also addressed those issues. The court referred to comments in the Commentary and concluded that these seemed to presume that non-physical blocking and trapping had to be performed by a foreign State power, in order to be covered.

The arbitration court therefore concluded that Cl. 15-16 only applies to non-physical hindrances if these are instituted by a foreign state power, and that blocking or trapping due to threats of attack by terrorists or pirates is not recoverable.

113 See Commentary 2023 p. 358 and Wilhelmsen/Bull 2017 pp. 390–391.

114 See to the following Wilhelmsen/Bull 2017 pp. 391–392.

8 Summary

This article investigates the influence of war on the development of Norwegian and Nordic marine insurance, in light of the lecture given by Sir Richard Aikens on "Wars and Laws: how war has influenced the development of the law of marine insurance". Sir Richard Aikens describes war situations that lead to legal problems which challenge the existing regulation and are resolved through litigation. The result of the litigation will then either be decisive for the clause that was considered or may result in new clauses.

The Norwegian/Nordic development is different, since the marine insurance regulation is a result of a systematic and comprehensive approach to regulation that is more similar to legislation. However, it is interesting to note that this approach appears to be triggered by wars and the weapons of war; the Crimean War and the North American war and the influence of these wars on the expanding Norwegian fleet, in particular the invention of the torpedo. These risks raised the need for common regulation and common calculation of risk. It is quite uncertain whether the Plan would have been initiated and developed without the existence of these war factors.

The concepts described in Sir Richard Aikens' lecture are also relevant for Norwegian/Nordic marine insurance, but the issues of insurable interest and duty of disclosure appear not to be influenced by war. On the other hand, the organization of marine risk and war risk respectively, and the concept of war risk, are both naturally influenced by war, in particular World Wars I and II. In modern times, the distinction between war risk and marine risk, as well as war risk cover, are particularly influenced by political unrest, rather more than by actual war.

The general concept that is most influenced by war is the concept of causation, where litigation during World War I established the dominant cause rule as the main rule for causation in Norwegian insurance law, but with litigation during World War II then resulting in a much more nuanced and flexible system for marine insurance.